

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

Review No. : 07/2015

In the case between:

THE STATE

And

TSHEPO MODUMELA AND 5 OTHERS

CORAM: RAMPAL, J et HINXA, AJ

JUDGMENT: HINXA, AJ

DELIVERED ON: 5 MARCH 2015

- [1] This matter served before me as a special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977.
- [2] The six accused were charged with contravention of section 42(1)(a) of the Immigration Act 13 of 2002 (entering and residing in the Republic of South Africa without a valid passport or permit). They all pleaded guilty and were duly convicted by the court *a quo* on 11 December 2014. Each was thereupon sentenced to pay a fine of R3 000,00 or to undergo six months imprisonment in default of payment of a fine. According to their review forms did not afford to pay and were presumably serving the prison term on 19 January 2015 when the matter was sent on special review.

- [3] The trial magistrate deemed it prudent to refer the matter to the High Court as special review with the request that the sentence be set aside. In the covering letter in this regard the learned magistrate remarked as follows:

“... The court acted in terms of section 112(1)(a) of Act 51 of 1977 and when imposing sentence exceeded the imprisonment term jurisdiction by imposing six months instead of three months. The monetary jurisdiction is in order though.

I therefore humbly request the Honourable Reviewing Judge to amend the term of imprisonment accordingly to be in line with the provisions of section 112(1)(a), Act 51 of 1977.

I would also like to apologise for the late sending of the case for review as by the 31/12/2014 it was not back from the transcribers and I was on leave from the 2/1/2015 to the 16/1/2015. It was handed to me on my arrival on the 19/1/2015.”

(my underlining for emphasis)

- [4] At the outset it must be pointed out that the reasoning of the learned magistrate (as depicted by my underlining above) that section 112(1)(a) of Act 51 of 1977 (“section 112(1)(a)”) imposes a limitation of three (3) months imprisonment is not sustainable. Such contention cannot be entertained by placing any reliance on section 112(1)(a) since this section is virtually silent on the alternative imprisonment term (hereinafter referred to as “alternative”).
- [5] For the sake of clarity and ease of reference I herewith recite the aforesaid section. It reads as follows:

“(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea—

(a) the presiding judge, regional magistrate or magistrate may, if he or she 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 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 or she has pleaded guilty on his or her plea of guilty only and— (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine 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;”

[6] At this juncture I pause to stress that if any interference with the alternatively meted out herein were to be warranted, justification thereof would be premised on the Adjustment of Fines Act 101 of 1991. Section 1 thereof clearly stipulates that for every R60 000,00, an alternative imprisonment term should be 36 months. At the risk of stating the obvious, for R5 000,00 fine, the alternative would be three (3) months as envisaged by the learned magistrate in *casu*.

[7] I do not deem it prudent to follow that route neither under the particular circumstances of this case. In her address the magistrate comprehensively and cogently alluded to the adversity currently afflicting her area of jurisdiction consequent upon illegal immigration. A healthy balance was, in my view, judiciously heeded between all the relevant

factors i.e. the crime, the criminal and the interests of the society.

[8] It is trite exposition of our law that sentencing must be individualised and thus each case must be adjudicated on its own merits. It is equally trite principle of our law that sentencing regime resorts exclusively within the purview of the trial magistrate domain subject to judiciously exercise of such discretion. In *casu* it is common *cause* that the trial magistrate in judicious exercise of sentencing discretion vesting in her, deemed the alternative of six months appropriate. It was only after he had bethought herself that she laboured under the misconception that she had exceeded the jurisdictional limitation ordained by section 112 (1)(a). I hasten to add that the alternative is, furthermore, neither shockingly, startlingly; nor disturbingly disproportionate to the fine to warrant intervention.

That concludes the rationale behind which this matter was sent on special review.

[9] At this stage I see it timely to turn my attention to three other contentious issues with which this matter is fraught. I proceed to hereunder deal with them one by one.

[10] All the accused were legally represented throughout the trial. Having tendered pleas of guilty, it was incumbent upon the learned magistrate to solicit confirmation from the legal representative. For inapprehensible reason's this was omitted by the magistrate on one hand. On the other,

equally for inexplicable reason's, the legal representative did not consider it apposite to *mero motu* discharge his responsibility. For the sake of emphasis, it admits of mentioning that it is not open to doubt that the legal representatives are sometimes taken by surprise by their clients at plea stages.

I cannot but only optimistically speculate that in *casu* no such surprises unfolded and the attorney's passiveness implied acquiescence in line with the well-known expression, "silence means consent". Having said that, it remains to be said that it is undesirable that this aspect of the procedural law should be left to speculation, no matter how plausible and realistic the aforesaid speculation might be.

- [11] I come next to the second issue that engendered my disquiet in this matter. In his address on sentence the prosecutor vigorously argued for a very harsh sentence notwithstanding the reality that he had accepted a section 112(1)(a) plea route. Whilst on this point, it is apt to make reference to **S v Onesmus**; **S v Amukoto**; **S v Mweshipange** 2011 (2) **NR 461** (HC). At par [17] Liebenberg J dealt with a remarkably similar conduct of a prosecutor in the following terms:

"What I find most surprising and conflicting is that although the prosecutor held the view that these cases could be finalised in terms of section 112(1)(a) – thereby implying that they was minor offences – he, when addressing the court on sentence, submitted that the offences were of serious nature. What boggles the mind is, how can the same offence at the stage of pleading be considered to fall in the category of crimes classified as "minor offences", but when it comes to sentence, the same offence (on the

very same facts), is elevated to a “serious crime”? Prosecutors are reminded that they are officers of the court; and as such under a duty to serve the interests of justice. Had the prosecutor representing the State in these cases been serious, then he would not have intimated to the court to invoke the provisions of section 112(1)(a); but instead, would have insisted that section 112 (1)(b) be applied, where the court was obliged to do so in terms of the Act ...”

- [12] I find the above alluded to dictum not only apposite but also instructive in the situation obtaining in *casu*. That is all the more so when the prosecutor does not only argue for a harsher sentence but for imprisonment without an option of a fine like in this matter.
- [13] Steyn in his legal writing, “Questioning: The Undefended Accused – Practical Examples for Magistrates (2011) at 27” echoes sentiments similar to those of Liebenberg J in **Onepmus** case *supra*. He points out that the integrity of the public prosecutor is very crucial in the application of section 112(1)(a). This sentiment has much to commend itself in my view.
- [14] I proceed to deal last with an irregularity which is interrelated with the aforesaid two already disposed of. After the prosecutor had addressed on sentence, the learned magistrate, once more, failed to invite the attorney to respond if he deemed necessary. I must hasten to point out that such an invitation was peremptory not only as a legal principle but also in view of the forceful submission for an imprisonment advanced by the prosecutor. I cannot but feel

that it is unthinkable that the attorney would have, if called upon, shunned responding. I premise my view on two grounds: First, the attorney would never concur with the submission for imprisonment term by the prosecutor which sought to thwart, in a substantial measure, his plea for mercy in mitigation of sentence. Second, it would not take too argumentative an attorney to remind the court that a term of imprisonment without the option of a fine in *casu* would be a contravention of the very section 112(1)(a) upon which the entire proceedings were sustainable.

[15] In concluding on the highlighted irregularities, I am of the persuasion that they are not of such gravity as to vitiate the proceedings. In my view, no prejudice has been suffered by any one, administration of justice included, for the hereunder reasons:

- 15.1 *Ad* first irregularity: Had the instructions of the accused to the attorney been to plead not guilty, it would not take any effort for the attorney to *mero motu* stand up and address the court accordingly;
- 15.2 *Ad* second irregularity: The court did not heed the call by the prosecutor for custodial punishment. On the contrary, it limited itself exclusively within the confines of section 112(1)(a). It bears emphasis that the court did not even impose the maximum fine of R5 000,00 permissible pursuant to a section 112(1)(a) conviction.

15.3 *Ad* third irregularity: The sentiments expressed at paragraph 15.2 *supra* are directly in point on this aspect as well. I need to say no more.

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

“The conviction and sentence are confirmed.”

M. D. HINXA, AJ

I agree.

M. H. RAMPAL, J