

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 90/2015

In the appeal between:-

THE STATE

and

ALLAN BANDA

CORAM: DAFFUE, J et NAIDOO, J

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 4 JUNE 2015

- [1] This matter was referred by the senior magistrate of Welkom, Mr S F Ferreira, to the High Court as a special review in terms of s 304(4) of the Criminal Procedure Act, 51 of 1977 (‘the CPA’). This sub-section applies where the accused was legally represented, but the proceedings were not in accordance with justice
- [2] The accused, Allan Banda, a [.....] year old Zimbabwean [....] citizen was arraigned in the Welkom magistrates’ court on a count of contravening of s 49(1)(a) of the Immigration Act, 13 of 2000, read with sections 1, 10, 25 and 26 of that Act, in

that upon or about 26 April 2015 and at Welkom the accused found himself in the Republic of South Africa without a valid passport and permit. On 14 May 2015 he was convicted and sentenced to 30 (thirty) days' imprisonment.

- [3] The accused was represented by an attorney of the Legal Aid Board at the trial. He pleaded guilty and was convicted accordingly by the presiding magistrate in accordance with the provisions of s 112(1)(a) of the CPA. In addressing the court on sentence both his legal representative as well as the prosecutor requested the court to impose a sentence of "*imprisonment coupled with a fine*". The word "*coupled*" is indicative thereof that imprisonment together with a fine was requested, unless the proficiency in English of the two legal representatives is not up to standard and they really wanted the court to impose imprisonment with the option of a fine. It is uncertain how the presiding magistrate interpreted these submissions. When one reads the judgment on sentence and especially the second last paragraph thereof, the impression is created that the presiding magistrate was of the view that both legal representatives requested him to impose a sentence providing for the option to pay a fine. I quote the paragraph *verbatim*:

"Right. I'm not going to give you a sentence that consists of a fine with the opinion of – imprisonment with the option of a fine, because those sentences are not effective in deterring these type of offences. I'm going to give you a short term of imprisonment that

will allow the authorities in the meantime to get your paperwork ready so you can be deported back to your country or origin.”

- [4] Section 49 of the Immigration Act, as amended by s 20 of the Immigration Amendment Act, 13 of 2011 reads as follows:

“49(1)(a) Anyone who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years.”

- [5] The presiding magistrate did not consider the provisions of s 112(1)(a) of the CPA at all when sentence was imposed. Regrettably, the two legal representatives failed to make submissions in this regard. Although the magistrate would be entitled in appropriate circumstances to impose direct imprisonment without the option of a fine in accordance with the provisions of s 49 of the Immigration Act, the provisions of s 112(1)(a) of the CPA had to be followed *in casu*, but were disregarded *in toto*. This is a pity. Presiding officers in our magistrates’ courts deal with the provisions of s 112 on a daily basis and are presumed to be familiar therewith.

- [6] It is perhaps convenient to quote s 112(1)(a) and (b) fully in order to distinguish between the two sub-sections. Section 112(1) 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 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 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;
- [Para. (a) substituted by s. 4 (a) of Act 109 of 1984, by s. 7 (a) of Act 5 of 1991 and by s. 2 of Act 33 of 1997.]
- (b) the presiding judge, regional magistrate or magistrate **shall**, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence." (emphasis added.)

[7] The difference between sub-section 112(1)(a) and sub-section 112(1)(b) is evident and should be known to each and every person appointed to the bench, whether as a judge, regional court magistrate or a magistrate. If an

accused pleads guilty and his plea is accepted by the prosecutor, the presiding officer 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 a fine exceeding the amount determined by the Minister from time to time (at present R5 000,00) convict the accused in respect of the offence and impose any competent sentence other than imprisonment or any form of detention without the option of a fine or a fine in excess of R5 000,00.

- [8] If the presiding officer is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or a fine in excess of R5 000,00, or if the prosecutor requests him to do so, he shall question the accused with reference to the alleged facts of the case in order to ascertain whether the accused admits the allegations and charge to which he has pleaded guilty and may, if satisfied that the accused is guilty of the offence to which he has pleaded guilty, convict him on his plea of guilty and impose any competent sentence.
- [9] In *casu* the prosecutor accepted the plea of guilty and did not ask the presiding magistrate to question the accused in terms of the provisions of s 112(1)(b). The presiding magistrate also failed to conduct such questioning. The matter clearly fell within the ambit of s 112(1)(a), the necessary consequence being that imprisonment or any form of detention without the option of a fine could not have been imposed.

[11] The accused was sentenced on 14 May 2015 and the special review request was forwarded to this court on 22 May 2015. The matter was allocated to the scribe of this judgment on 29 May 2015 and immediately attended to.

[12] The proceedings in the court *a quo* were not in accordance with justice and the sentence should be adjusted to provide for payment of a fine as an option. The senior magistrate suggested that, without being prescriptive, the sentence to be imposed might be partially or wholly suspended. This country is faced with a serious and continuous influx of illegal foreigners and I am not prepared to suspend any portion of the sentence to be imposed. It would be futile to refer the matter back to the court *a quo* to reconsider the sentence as by then, the accused would have served his sentence. Although the ability of the accused to pay a fine has not been recorded, it would be appropriate *in casu* to deal with sentence now and provide for payment of a fine as an option. An amount of R1 500.00 would be a just option.

[13] As a result the following order is granted:

The sentence imposed by the magistrate is reviewed, set aside and replaced by the following:

"The accused is sentenced to 30 (thirty) days' imprisonment or payment of a fine of R1 500.00."

I concur.

S. NAIDOO, J

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