

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

Review No. : 95/2015

In the special review between:-

THE STATE

and

PHOSI THABISI

CORAM: MOCUMIE, J *et* MIA AJ

JUDGMENT BY: MOCUMIE, J

DELIVERED ON: 16 JULY 2015

[1] This is a special review in terms of Section 304 of the Criminal Procedure Act 51 of 1977 (the CPA). The accused appeared before the Magistrate court, Ficksburg, on two charges, Count 1, contravention of s41 (1) read with ss (2) of the CPA, furnishing false information to a police officer. Count 2, contravention of s49 (1) of the Immigration Act 13 of 2002, entering the Republic of South Africa without a valid passport. The accused was found guilty on both counts. In respect of count 1, he was sentenced to 'six months imprisonment without an option of a fine.' In respect of count 2, he was sentenced to 'R1000 or six months imprisonment.'

[2] The Magistrate submitted this matter on special review because he exceeded the prescribed statutory penalty in respect of count 1. The relevant section of the CPA, s41 (2) provides that upon conviction, the accused shall be sentenced to a fine not exceeding R300.00 or imprisonment for a period not exceeding three months.

- [3] It is trite that once a court has disposed of a matter finally it cannot correct its own judgment and order. This is derived from the long standing principle of *functus officio*. The Supreme Court of Appeal in *De Villiers NO and another v BOE Bank Ltd*¹ re-affirmed this long standing principle. The court further highlighted a few exceptions under which a court may alter its own order or judgments. 'The first is that the principal judgment or order may be supplemented in respect of accessory or consequential matters (such as costs). The second exception is where on a proper interpretation, the meaning of an order remains obscure, ambiguous or otherwise uncertain. The court may then clarify it so as to give effect to its true intention, provided it does not thereby alter the sense and substance of the judgment or order. A third instance in which a court may correct an order is where a clerical, arithmetical or other error exists in its judgment. The final exception is where counsel has argued the merits and not the costs of a case but the court, in granting judgment also makes an order concerning costs..'²

In the event that a wrong sentence is passed by error, the court may, before or immediately after it is recorded, amend the sentence.³ This section is similar to what is provided under Rule 42 of the Rules of Court applicable in respect of High Courts. The word 'immediately' under s298 is not defined nor is there any guidance to Magistrates in the same situation as in this case on the word. Generally, as occurred in the present matter, the mistake occurred on 19 May 2015, and it only came to the Magistrate's attention after 19 May, he is bound to refer the matter to the High court to set it aside and correct it in whichever way it deems fit. This has been the case also because the Magistrate is a creature of statute and cannot go beyond the provisions of the empowering legislation. Neither does the Magistrate court have

¹ *De Villiers NO and another v BOE Bank Ltd* [2004] 1 All SA 481 (SCA), 2004 (3) SA 459 (SCA).

² *De Villiers* above.

³ Section 298 of the Criminal Procedure Act 51 of 1977.

inherent jurisdiction to act otherwise than provided by the empowering legislation, unlike the higher courts.

- [5] Although s298 gives the Magistrate almost the same parameters to correct its own judgment and order as Rule 42 gives a Judge in the High court, in practice there is no guidance on the period envisaged in the word 'immediately'. As in this case, assuming that the Magistrate only realised his mistake on 27 May 2015, as per his covering letter, it would mean 8 days had already passed and he could not correct it on the simple basis that the prejudice the CPA seeks to prevent had already been set in motion; and the accused's right to a fair trial had already been adversely affected. The High court is then the only court that can correct this error. s298 continues to serve an important role. It serves to safe guard the fair trial rights of an undefended accused. It further serves as a form of checks and balances for undefended accused persons. This mechanism is all that an undefended accused has against all possible forms of atrocities which could inadvertently arise.
- [6] Having said that, I am in total agreement that the error is indeed one that must be corrected as proposed by the Magistrate as I do hereafter. Not much of the accused's personal circumstances were placed on record. However, the following factors can be discerned from the charge sheet and the questions posed by the Magistrate in terms of s112: The accused was [.....] years of age at the time of the commission of this offence. He was employed. Thus he could, in all probability, afford to pay a fine or at least raise money to pay a fine in order to keep his employment and not add to the number of unemployed citizens of this country and likewise in the neighbouring countries. He is a first offender. He has two dependant children.
- [7] Taking into account all those favourable factors, it would have been prudent for the Magistrate to have considered an option of a fine as

well on this count as he did in respect of count 2. Such sentence would give the accused an opportunity to continue to work for himself, his children and other dependants. This is so because there is no evidence that he entered the Republic to commit any serious crime. Thus he cannot be sacrificed at the expense of those who do so. The sentence in respect of count 1 ought to be set aside and substituted with one which is balanced and just.

[8] In the result the following order is granted.

ORDER

1. The sentence in respect of count 1 is set aside and substituted with the following:

'The accused is sentenced to R300.00 or 3 (three) months imprisonment.'

2. The conviction and sentence in respect of count 2 are confirmed.

I concur.

()

B.C. MOCUMIE, J



S.C. MIA