

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review Case No:118/2014

In the matter between:-

THE STATE

Applicant

and

THABO JWELE

Respondent

CORAM:

RAMPAL, AJP *et* DAFFUE, J

JUDGMENT BY:

RAMPAL, AJP

DELIVERED ON:

13 JUNE 2014

- [1] The matter came before me by way of a special review. The accused was convicted on the 5th June 2014 on a charge of contravening section 49(1)(a) of Act No 13 of 2002. He pleaded guilty to the charge that he was an illegal foreigner or prohibited immigrant. Following his plea the magistrate applied the procedure in terms of section 112(1)(a) of the Criminal Procedure Act 51 of 1977.
- [2] The accused was then summarily sentenced to 3 months direct imprisonment in terms of section 276(1) Act 51 of 1977. He is currently serving the sentence at the Virginia Correctional Facility.

- [3] The matter came to the attention of the senior magistrate, Mr S F Ferreira. Having perused the record, he came to the conclusion that the trial magistrate committed a reviewable procedural irregularity by imposing a sentence of 3 months direct imprisonment without an option of a fine. Such a sentence, the senior magistrate reasoned, could not be properly imposed in terms of section 112(1)(a) of Act No 51 of 1977.
- [4] It is useful to quote the relevant section. Section 112(1)(a) stipulates:

“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 fee exceeding the amount determined by the Minister from time to time by notice in the *Gazette*”

- [5] At paragraph 4 of his memorandum dated the 10th June 2014 the senior magistrate said the following:

“It was also decided in **S v Khoalane** 2012 (1) SACR 8 (FB) page 10 paragraph 6 by Honourable Judge Rampai that:

‘Before the questioning in terms of sub-s(1)(b) can be jettisoned, before sub-s (1)(a) can be invoked and before an unrepresented accused can be convicted on her unexplained plea of guilty, a court has to form an opinion that the charge concerned is a minor crime, **that the accused would have the option of paying a fine to stay out of a correctional facility** and that such fine would not exceed the statutory maximum limit. These are the crucial segments of the jurisdictional facts.”

- [6] On the strength of the aforesaid decision as well as the statutory provision, the senior magistrate suggested that the sentence be set aside; that the matter be sent back to the district court and that a sentence be considered afresh.

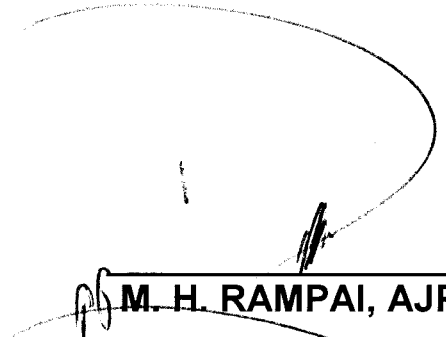
- [4] I am persuaded that the accused was irregularly sentenced. The procedural irregularity cannot be allowed to stand. I would, therefore, set the sentence imposed on the accused aside.

- [8] Accordingly I make the following order:

8.1 The conviction of the accused stands.

8.2 The sentence imposed on him on the 5th June 2014 is set aside.

8.3 The trial magistrate is directed to sentence the accused afresh bearing in mind the guidelines outlined herein and to sentence the accused afresh if all the requirements of the section are met.



M. H. RAMPAI, AJP

I concur.

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J.P. DAFFUE, J