

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 71/2013

In the review between:-

THE STATE

and

NEO MOCHOCHONDNO AND 8 OTHERS

CORAM: MOCUMIE, J *et* MOLEMELA. J

DELIVERED ON: 25 APRIL 2013

MOCUMIE, J

- [1] The nine accused appeared in the Magistrate court, Welkom, on two counts. Count 1 was in respect of a contravention of section 1 (1) Act 6 of 1959, trespassing, and count 2 was in respect of a contravention of section 49 (1)(a) of the Immigration Act, Act 13 of 2002(*“the Immigration Act”*), entering the Republic of South Africa without a valid passport or any other legal documents. They all (accused 1 to 6 and accused 8 and 9) pleaded guilty to both counts and were convicted as charged. The State elected not to proceed

on count 2 against accused 7. They were all, except accused 7 in respect of count 2, sentenced as follows:

“Count 1: 12 (twelve) months imprisonment.

Count 2: Fine[d] R1500 (one thousand five hundred rand) or 6 (six) months imprisonment”

- [2] The magistrate seized with the matter placed it before this Court on special review in terms of section 304 of the Criminal Procedure Act 51 of 1977 (“the CPA”) on the basis that *she “[has] exceeded the penal jurisdiction when sentencing the accused on a charge of contravening section 49(1)(a) of the Immigration Act, Act 13 Of 2002.”*

She further requested this Court to “alter the sentence to read R1500,00 or 3 months imprisonment.”

- [3] In their guilty pleas in terms of section 112 of the CPA which were contained in written statements which were read into the record and admitted as exhibits A-I, in respect of count 2, they all, i.e. accused 1 to 6 and accused 8 and 9, admitted entering and remaining in the Republic of South Africa without valid passports or any other legal documents. The

magistrate was, correctly so, satisfied with their explanation and convicted them as charged.

- [4] The only issue this Court has to address is the sentences the magistrate imposed on all nine accused as set out above in respect of count 2 only. For this reason it is important to quote the relevant section that gives a court the powers to impose a particular sentence on an accused once convicted of contravening s49 of the Immigration Act.

- [5] Section 49 (1) (a) of the Immigration Act provides:

“Anyone who enters or remains in 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 three months”.

- [6] Contravention of s49 (1) (a) is by its very nature a very serious offence. Lately it is an offence that is generally committed in conjunction with other serious offences such as trespassing, coupled with theft of minerals such as gold on old mines which have been shut down due to safety concerns on them or exhausted resources. It is also

sometimes linked to stock theft or more serious offences such as murder and drug trafficking.

[7] It has to be acknowledged upfront that the penalty prescribed in the Act can be quite frustrating for presiding officers as it limits them from imposing heavier sentences in appropriate cases in order to send the right message to society and illegal immigrants, taking into consideration the consequences that usually flow from its contravention as highlighted above: that entering the Republic of South Africa illegally is regarded in a serious light and will be dealt with severely. However, until the legislature intervenes by increasing the penal jurisdiction to suit the seriousness of this offence, courts are duty-bound to impose a fine or to imprisonment not exceeding three months.

[8] It is therefore clear that the trial magistrate exceeded her jurisdiction when she imposed six months imprisonment instead of three months as the section prescribes and as she correctly acknowledged in her request for review. However, in my view, this is not an error to be corrected as if it is a

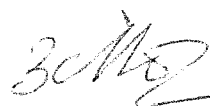
typing error. It is a material irregularity which vitiates the proceedings.

- [9] In the circumstances and based on that material irregularity the sentence imposed in respect of count 2 ought to be set aside and substituted with the following.

SENTENCE:

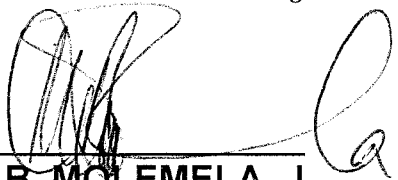
In respect of count 2, contravention of section 49 (1) (a) of the Immigration Act, Act 13 of 2002, accused 1 to 6 and 8 to 9 are each sentenced as follows:

“R 1 500.00 (One thousand and five hundred rand) or 3 (three) months imprisonment.”



B. C. MOCUMIE, J

I concur.



M.B. MOLEMELA, J

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