

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 95/2013

In the review between:-

THE STATE

versus

MOJALEFA MICHAEL MADUNA

MOTAUNG TEBOHO WALTER

CORAM: VAN ZYL, J *et* JORDAAN, J

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 4 JULY 2013

- [1] This is a review matter in which the two accused were charged with escaping from lawful custody in contravention of section 51(1) of the Criminal Procedure Act. They were represented and pleaded guilty to the charge as set out. In their statement in terms of section 112(2) of the Criminal Procedure Act, they deposed to virtually identical statements which read as follows:

“I am an/ the accused in the matter and make this statement freely and voluntarily in my sober senses without any undue influence.

That on the 04th August 2011, the Police Motor vehicle came to Tseki Police Station, to collect us for being transferred to Kroonstad Prison. While the police van approaching Uniqwa (University) myself and accused 2 broke the police van’s window

and immediately went out of the window, while the police motor vehicle was still in motion.

At that moment, I was aware that my actions were unlawful and for the said actions. I am pleading guilty for escaping from the lawful custody.”

- [2] Both accused were convicted as charged without any further questions and sentenced to four (4) years imprisonment each, whilst the learned magistrate also ordered that, in terms of section 276B(1)(a) of the Criminal Procedure Act, the accused were to serve their entire sentences without being eligible for parole.
- [3] For some unknown reason this matter only came to the attention of the High Court in April 2013 when an Acting Judge requested reasons for sentence, being of the opinion that it is *prima facie* too severe and also questioned the applicability of section 276B(1)(a) of the Criminal Procedure Act as far as the circumstances of this matter is concerned.
- [4] From the magistrate’s reasons it appears that the said magistrate has since retired, but the magistrate says that escaping from lawful custody is a very serious offence and prevalent in the area and that therefore it was a serious matter that justified a sentence of four (4) years imprisonment. She also says that she applied the prescripts of section 246B(1)(a) of the CPA because both accused were in custody on serious matters.

- [5] After considering the matter and the reasons supplied by the learned retired magistrate, it appears to me that the requisites of section 51(1) of the Criminal Procedure Act has not been proven in terms of the statements made by the two accused. They did not admit that they were lawfully arrested as required in the said section, neither that they were in lawful custody at the time. See **S v Mafora** 2010 (1) SACR 269 (NWM) at 272 paras [8] – p 273 para [12].
- [6] The convictions therefore cannot be confirmed and has to be set aside. Due to the time that has elapsed and the sentence imposed on the two accused, there is no sense in remitting this matter to the trial court for a fresh consideration.
- [7] As far as the sentences are concerned, it is obviously shockingly severe in the circumstances. The fact that the two accused were awaiting trial on serious charges, does not justify harsher sentences since the question whether they are guilty of those charges still had to be decided. What is more, the trial court ordered that they have to serve their full sentences, purportedly in terms of section 276B(1)(a) of the Criminal Procedure Act. The court obviously failed to have regard to subsection (b) of the aforesaid section, which limits the court's discretion to at most two thirds of the term of imprisonment.
- [8] In view of the plethora of misdirections by the trial court, the convictions and sentences have to be set aside.

- [9] In the result the convictions and sentences of both accused are set aside. This order is to be communicated to the prison authorities as a matter of urgency.

A.F. JORDAAN, J

I concur.

C. VAN ZYL, J

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