

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 159/2013

In the review between:-

THE STATE

versus

<u>TSOLO TSOLO</u>	Accused 1
<u>BONIFAS SOURCE</u>	Accused 2
<u>THABISI TANKI</u>	Accused 3

<u>CORAM:</u>	KRUGER, J <i>et</i> DE WET, AJ
----------------------	--------------------------------

<u>JUDGMENT BY:</u>	DE WET, AJ
----------------------------	------------

<u>DELIVERED ON:</u>	15 AUGUST 2013
-----------------------------	----------------

- [1] Three accused were charged on four counts. Count 1 being a charge of trespassing;
Count 2 a charge of attempted theft;
Count 3 alleges a contravention of the Immigration Act 13 of 2002; and
Count 4 a contravention of section 18(2)(a) and (b) of the Riotous Assemblies Act 17 of 1959 (sic).
- [2] Charge number 3 was withdrawn by the Public Prosecutor against accused number 1 and 2.

- [3] The accused were legally represented and accused number 1 and 2 pleaded guilty to charges 1, 2 and 4 and accused number 3 pleaded guilty to all four charges.
- [4] The accused were convicted by the Magistrate Welkom on statements in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (as amended) made by each accused on the aforesaid charges.
- [5] For some unknown reason the Magistrate then proceeded to sentence accused 1 and 2 on count 3 (which had been withdrawn by the Public Prosecutor) and failed to sentence accused number 3 on the same count.
- [6] As far as the fourth count is concerned the accused were charged and convicted of contravening section 18(2)(a) and (b) of Act 17 of 1959. The Riotous Assemblies Act is however Act 17 of 1956 and it would seem that neither the Public Prosecutor nor the learned Magistrate ever looked at the Act itself not even after my learned brother Phalatsi AJ enquired whether the Act referred to is applicable.
- [7] The Magistrate concedes that the conviction of the accused on counts of conspiracy and attempted theft are wrong “as both crimes merge, splitting therefore in this regard is ill placed”. In **Rex v Milne and Erleigh (7)** 1951 (1) SA 791 (AD) at p. 823 Centlivres CJ remarked:

“In practice... the construction of that section is only of real importance in cases where the incitee does not do the act which he has been incited to do.”

See also **S v Khoza and Another** 1973 (4) SA 23 (O) at 25.

- [8] I have no doubt in my mind that convicting the accused on the charge of attempted theft, as well as on the charge of conspiring to commit theft, cannot be upheld as it will be a splitting of the charges as is correctly conceded by the learned Magistrate.
- [9] Accused number 3 was convicted on count 3, but the Magistrate failed to sentence accused number 3 on this count as he was apparently wrongly under the impression that accused number 3 was acquitted and therefore no sentence was imposed. To at this stage impose a fine on accused number 3 will serve no purpose. We have carefully considered the matter and decided to impose on accused number 3 the sentence below. The sentence must, however, not be seen as a precedent for future reference.
- [10] 10.1 The sentence of accused number 1 and 2 on count 3 is set aside.
- 10.2 On count 3 accused number 3 is cautioned and discharged.
- 10.3 Accused 1, 2 and 3 are acquitted on count 4. Their conviction and sentences on count 4 are set aside.

P.J.T. DE WET, AJ

I concur.

A. KRUGER, J

/spieterse