

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review Number: 262/2013

In the review of:-

THE STATE

and

EKKES NYATHI

CORAM:

MOLEMELA, J *et* LEKALE, J

DELIVERED ON:

07 NOVEMBER 2013

MOLEMELA, J

[1] This matter served before me as a special review as contemplated in the provisions of section 304(4) of the Criminal Procedure Act 51 of 1977.

[2] The accused person, an 18 year old Malawian national, was charged with contravention of section 49(1)(a) of the Immigration Act 13 of 2002 in that he entered and remained in the Republic of South Africa without a valid passport or permit. He was also charged with attempted theft of vouchers valued at R200.00. The accused pleaded guilty and was duly convicted by the court a quo. The two offences were taken together for purposes of sentencing and the accused person was sentenced to four (4) months' imprisonment. The court a quo further ordered that after serving his sentence, the accused person be deported to his country of origin.

[3] The trial magistrate referred the matter to the High Court on special review. In the covering letter to this referral the learned magistrate stated as follows:-

“During a judicial quality assurance assessment it was picked up that in the above-mentioned case an incompetent sentence was imposed. According to the query the accused was sentenced to four months imprisonment while according to the Act only imprisonment not exceeding three months could be imposed. Case herewith for your further attention.”

[4] The Immigration Act 13 of 2002 provides that a person who has contravened section 49(1) thereof shall, on conviction, be liable “to a fine or to imprisonment not exceeding three months”. I agree that in imposing a heavier sentence than the one stipulated in that Act, the court a quo acted *ultra vires* and imposed an incompetent sentence that falls to be set aside. It is indeed a pity that the incompetent sentence was only detected well after the sentence was served in full. According to the learned magistrate, the error was only discovered at an inspection that took place two years after finalisation of the matter. This case demonstrates how failure to conduct inspections on a regular basis or failure to have internal quality control measures in place can defeat their purpose and impact negatively on the rights of accused persons. It is a regrettable state of affairs. It is hoped that quality control inspections will be conducted more regularly in future.

[5] I am of the view that another reason why the sentence imposed by the court a quo is assailable and falls to be set aside is that the court a quo misdirected itself by concluding that an imprisonment sentence without the option of a fine was the only appropriate sentence to impose on an 18 year old first offender. Having formed this view, I directed a query to the trial magistrate, enquiring whether a custodial sentence was not too harsh considering that (i) the accused was only 18 (eighteen) years old at the time of commission of the offences; (ii) that he was a first offender; (iii) that he pleaded guilty; and (iv) that when he was sentenced he had already spent 7 (seven) weeks in custody awaiting trial.

[6] In his response to this particular query, the learned magistrate inter alia, stated as follows:

“It is my respectful view that a custodial sentence was not too harsh under the circumstances. Firstly the court did take into consideration the mitigation factors referred to by the Honourable Judge Molemela in her remarks. Except that the court also looked at other factors and also at how the community felt about these types of offences. In this regard the court took into consideration that at the time of the offences:

- (a) there had been a huge increase in the number of illegal immigrants in the District of Vrede [and] this aggrieved the community;
- (b) many businesses were opened by foreigners that had resulted in local citizens sitting without employment [and] this outraged the community;
- (c) Except for the accused being an illegal immigrant he had also been found guilty of Attempted Theft.”

[7] The learned magistrate further stated that he took judicial cognisance that at the time the offences were committed there had been a huge increase in the number of illegal immigrants in the district of Vrede and that many local citizens had lost their employment. He stated that he intended to send a strong message as many illegal immigrants were also charged with serious offences.

[8] Having considered the learned magistrate’s reasons and the record, I became fortified in my view that he indeed had misdirected himself by adopting an incorrect approach in sentencing the youthful accused person. In the case of **S v Phulwane and Others** 2003 (1) SACR 631 (T), the three appellants, aged 20 years, 22 years and 18 years respectively had been convicted of housebreaking with intent to steal and theft of groceries worth R1 500,00. They were sentenced to three years imprisonment. On appeal, the court held that the trial court had failed to acknowledge the important fact that the accused persons were relatively young, with clean criminal records and deserved sentences based more on rehabilitation than deterrence. The court set aside the sentences imposed by the trial court on the appellants and

remitted the matter back for a proper consideration of the sentence. At p634 the court *inter alia* stated as follows:-

“When a youth or juvenile strays from the path of rectitude to criminal conduct, it is the responsibility of judicial officers entrusted with the task of sentencing such a youth to ensure that he or she receives all relevant information pertaining to such a juvenile to enable him or her to structure a sentence that will best-suit the needs and interests of the particular youth. It is after all a salutary principle that sentence must be individualised. I venture to suggest that every judicial officer who has to sentence a youthful offender must ensure that whatsoever sentence he or she decides to impose will promote rehabilitation of that particular youth and have, as its priority, the reintegration of the youthful offender back into his or her family and, of course the community.”

[9] The court in that case also referred to the case of **S v Nkosi** 2002 (1) SACR 135 (W) at 143b, where the following remarks were made:

“The fine balance that needs to be struck between society’s needs to punish crime while not overlooking the interests of a juvenile offender was emphasised by Botha JA in **S v Jansen & Another** 1975 (1) SA 425 (A) at 427 – 428 in the following terms: The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted personality being eventually returned to society.”

[10] I echo the sentiments expressed in both authorities referred to, above. It is to be borne in mind that the remarks made by the court in those cases were made notwithstanding the fact that the accused persons in those matters had committed serious offences. I am of the view that the offences committed by the youthful accused person in this particular matter (contravention of the Immigration Act, for which the maximum sentence is three months’ imprisonment and attempted theft of goods worth R200.00) clearly do not fall in the category of serious offences. Their prevalence does not, in my view, elevate them to the category of serious offences. The circumstances of this case thus cried out for the rehabilitation objective of sentencing to come to the fore. Instead, the court *a quo* sacrificed the accused person’s personal circumstances at the altar of deterrence and failed to individualise his sentence. The zeal to send a message that commission of a particular

sentence will not be tolerated must never be allowed to supersede the discretionary sentencing powers of imposing a sentence that fits the offence, serves the interests of society and is fully cognisant of the accused person's mitigating factors.

[11] The record does not show that the court a quo considered any other sentence than the custodial sentence it imposed. I am satisfied that its conclusion that direct imprisonment was the only appropriate sentence in circumstances that did not warrant such a sentence emanated from its under-emphasis of the accused person's personal circumstances. This constitutes a material misdirection. Imposing a custodial sentence on a youthful offender who had a clean record, had already spent seven weeks in detention, had not committed serious offences and had promptly pleaded guilty potentially exposed him to interaction with recalcitrant criminals and was indeed a serious injustice to both society and the offender in question. See **S v Phulwane** (*supra*) at 635d-e.

[12] The material misdirection committed by court a quo warrants interference with the sentence it imposed. In the case of **S v Malgas** 2001 (1) SACR 369 (SCA) at 478 d – h. "Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance".

[13] I also noted that in the process of sentencing the accused, the court a quo stated as follows:

"He [accused] was also found guilty of a very serious offence of attempted theft, there at Sindalowitch where he attempted to steal voucher papers and that is another problem with illegal immigrants in this country. It happens quite often that they are the persons being arrested for crimes being committed in this country, just like the accused."

These remarks are rather unfortunate. In the first place, attempted theft of vouchers valued at R200.00 does not warrant being classified as a serious offence. Secondly, without any statistical backing, the general remark that

illegal immigrants “quite often” commit crimes in this country is as unwarranted as the harsh sentence that was imposed on this young accused person.

[14] I have already alluded to the fact that the sentence was imposed two years ago. The Department of Correctional Services confirmed that the accused was deported to his country of origin after serving his sentence. Remitting the matter back to the trial court for sentencing will obviously serve no purpose under the circumstances.

[15] I now turn to consider sentence afresh. The accused person’s mitigating factors have already been highlighted. The impact of his age on determining an appropriate sentence has also been sufficiently canvassed earlier in this judgment. It cannot be denied that members of the community have, at various forums, verbally expressed their frustrations about what they perceive as the state’s shortcomings in addressing the problem of the presence of illegal immigrants in this country. The community expects the state to deal decisively with the matter. The judiciary, as one of the arms of the state, needs to do its part. It can only do so by imposing appropriate sentences that are dictated to by the facts of each case. I agree that any sentence that is imposed must, of necessity, be coupled with an order of deportation. Such orders, coupled with effective use of state resources to curb entry of illegal immigrants into the country will significantly reduce the prevalence of this offence.

[16] It is settled law that the period spent by an accused person in custody while awaiting trial must be taken into account when determining an appropriate sentence. The accused person spent seven weeks in custody awaiting his trial. The consideration of this period will be evident from the sentence that will be imposed.

[17] Having considered all the aforementioned circumstances, the following order is made:

1. The accused's conviction on both charges is confirmed.
2. The sentence imposed by the court a quo in respect of both charges is set aside and replaced with the following:

“A fine of R600.00 or 1 (one) month's imprisonment, wholly suspended for two years on condition that the accused is not again convicted of contravention of section 49(1)(a) of the Immigration Act 13 of 2002 or any offence with an element of dishonesty committed during the period of suspension.”
3. The sentence mentioned in clause 2 above is antedated to 12 April 2011.
4. The registrar of this court is directed to ensure that the Senior Magistrate or Head of Office responsible for Vrede Magistrate's Court is provided with a copy of this judgment for noting.

M.B. MOLEMELA, J

I concur.

L.J. LEKALE, J

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