

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 411/2011

In the review between:-

THE STATE

and

THABO MANEELA

Accused 1

TSIETSI THIBELA

Accused 2

CORAM:

MOCUMIE, J *et* PHALATSI, AJ

JUDGMENT BY:

PHALATSI, AJ

DELIVERED ON:

16 FEBRUARY 2012

[1] This is a review in terms of Section 302 of the Criminal Procedure Act, 51 of 1977 (“the CPA”). The two accused were charged with Count 1; attempted theft. In the alternative, they were charged with contravention of Section 1(1)(a) or (b), read with Section 1(1A), (2) and 2 of the Trespass Act, 6 of 1959 (“the Act”), trespassing; and further read with Section 250(1)(d) of the CPA. They were further charged with Count 2; contravention of Section 49 of the Immigration Act, 13 of 2002 (“the Immigration Act”), in that

they unlawfully entered and remained in the country (Republic of South Africa), without a valid passport or permit.

- [2] Both accused pleaded guilty on Count 2 and were convicted as charged. Evidence was led in respect of Count 1. They were acquitted on Count 1, but convicted on the alternative charge of trespassing. They were sentenced as follows (loosely translated):

“The alternative on Count 1 (trespassing), accused 1 was sentenced in terms of Section 276(1)(b) of the CPA to 24 (twenty four) months imprisonment. Accused 2 was sentenced to pay a fine of R2 000-00 (two thousand rand) or 8 (eight) months imprisonment and a further sentence of 4 months imprisonment, wholly suspended for four years, on condition that he is not found guilty of contravention of Section 1 (1) of Act 6 of 1959, committed during the period of suspension.

On Count 2, accused 1 was sentenced to pay a fine of R1 000-00 (one thousand rand) or 90 (ninety) days imprisonment. Accused 2 was sentenced to pay a fine of R400-00 (four hundred rand) or 30 (thirty) days imprisonment.

In addition to these sentences, an amount of R10 200-00 (ten

thousand and two hundred rand), which was found in the possession of the accused during their arrest, was declared forfeited to the State.”

- [3] As indicated, when this matter came to this Court on review, a query was directed to the magistrate, to indicate on what basis he declared the money found in the possession of the accused, forfeited to the State, as the money was not used during the commission of the offences for which the accused were convicted. The magistrate correctly conceded that the money was not used during the commission of the offences and thus s35 (1) of the CPA was not applicable in this case.

- [4] Section 35(1) of the CPA provides as follows:

“A court which convicts an accused of any offence may, without notice to any person, declare-

- (a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
- (b) if the conviction is in respect of an offence referred to in Part 1 of Schedule 1, any vehicle, container or other article which was used for the purpose of or in connection

with the commission of the offence in question or for the conveyance or removal of the stolen property, and which was seized under the provisions of this Act, forfeited to the State...”

[6] This is a material irregularity which vitiated the proceedings before the magistrate and which entitles this Court to interfere with the sentence in so far as the declaration in terms of s35(1) of the CPA is concerned.

[7] In the light of the above, the sentences in respect of the alternative to count 1 and in respect of count 2 imposed on the two accused by the magistrate are confirmed.

[8] The order of the magistrate declaring the amount of R10 200-00 (ten thousand and two hundred rand), which was found in the possession of the two accused during their arrest, forfeited to the State, is hereby set aside.

N.W. PHALATSI, AJ

I concur.

B.C. MOCUMIE, J

/sp