

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 22/2012

In the review between:

THE STATE

versus

THABISO MONAHENG AND TWO OTHERS

CORAM: LEKALE, J *et* MHLAMBI, AJ

JUDGMENT BY: LEKALE, J

DELIVERED ON: 3 MAY 2012

[1] The three accused persons, all Lesotho Nationals, were convicted of and sentenced for trespass and being illegal foreigners in the Republic of South Africa by the Welkom Magistrates' Court on 13 January 2012.

[2] They were each sentenced to R4 000,00 fine or 12 (twelve) months imprisonment of which R2 000,00 or 6 (six) months imprisonment was conditionally suspended for 3 (three) years for contravention of the provisions of Trespass Act No. 6 of 1959 as charge number 1. They were, further, each

sentenced to R3 000,00 fine or 18 (eighteen) months imprisonment of which R2 500,00 or 15 (fifteen) months imprisonment was conditionally suspended for a period of 3 (three) years for contravention of the provisions of Immigration Act No. 13 of 2002 as charge number 3 after charge number 2 was withdrawn by the prosecutor.

- [3] The matter, thereafter, served before my sister Van Zyl J on special review in terms of section 304(4) of the Criminal Procedure Act No. 51 of 1977 as amended (CPA) without any reasons therefor having been furnished. The sentences imposed raised the eyebrows of the learned reviewing Judge who, thereupon, directed the following query to the trial magistrate:

“Count 1: The maximum penalty for trespassing is a fine of R2000.00 or imprisonment for a period not exceeding 2 years or both such fine and such imprisonment. (Section 2(1) of Act 6 of 1959) ...

Count 3: The penalty clause in the Immigration Act determines the penalty to be a fine or imprisonment not exceeding 3 months. Calculated in terms of ... Adjustment of Fines Act, it is R5000.00 or 3 months imprisonment. Is

the sentence ... not exceeding this limit?"

- [4] The learned magistrate has since responded apologising for the oversight in not enclosing the reasons and pointing out that:

4.1 Ad charge 1: The sentence is in line with our law and recent decisions which were sent on review and confirmed.

4.2 Ad charge 3: The sentence exceeds the limit prescribed by Immigration Act and it was for that reason that the matter was earmarked for special review.

- [5] I am in respectful agreement with the trial magistrate that the sentences in respect of charge 3 exceed the penal jurisdiction prescribed by the Immigration Act and are, as such, a nullity in law and fall to be corrected *ipso facto*. (See **S v NTULI** 1975 (1) SA 439 (A) at 435 C and **S v HAYMAN** 1988 (1) SA 831 (NC).)

- [6] I can, however, not agree with the court *a quo* that the sentences in respect of the trespass charge *viz* charge

number 1 are in line with our law. As correctly pointed out by Van Zyl J in the query, section 2 of Trespass Act limits the penal jurisdiction of the sentencing court in peremptory terms.

[7] The trial court, therefore, exceeded its jurisdiction by imposing incompetent sentences. The sentences in question also fall to be corrected.

[8] I am satisfied from the record that the convictions are in accordance with justice.

[9] The trial magistrate proposes a fine of R500,00 or 45 (forty five) days imprisonment as an appropriate sentence in respect of charge number 3 and in respect of each accused person. I can find no fault with the proposal save for the fact that the provisions of Adjustment of Fines Act No. 101 of 1991 are applicable because the maximum fine is not prescribed while the maximum period of imprisonment is prescribed.

[10] It is clear from the record that each accused paid the fine and got released immediately after the sentences were

imposed.

ORDER:

[11] Consequently the convictions are confirmed but the sentences are set aside and in their places and stead are substituted the following:

“Each of the three accused persons is sentenced as follows:

Ad charge 1: A fine of R2 000,00 or 2 (two) years imprisonment and a further 2 (two) years imprisonment suspended for 3 (three) years on condition that the accused is not found guilty of violating the provisions of section 1(1)(a) or (b) read with sections 1(1A), 1(2) and 2 of the Trespass Act No. 6 of 1959 and further read with section 250(1)(d) of the Criminal Procedure Act No. 51 of 1977;

Ad charge 3: R500,00 or 10 (ten) days imprisonment.”

[12] The sentences are antedated to take effect from 13 January 2012.

L.J. LEKALE, J

I concur.

J.J. MHLAMBI, AJ

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