

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 185/2012

In the matter between:-

THE STATE

and

PIUS PHEMADU

CORAM:

HANCKE, AJP *et* DAFFUE, J

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

18 OCTOBER 2012

[1] This is a special review in accordance with the provisions of section 304(4) of the Criminal Procedure Act, 51 of 1977 ("the Act").

[2] The accused was charged with and convicted of the offence of entering and/or remaining in the Republic of South Africa in contravention of section 49(1) of the Immigration Act, 13 of 2002. He pleaded guilty and a statement in terms of section 112(2) of the Act was presented to the court on his behalf by his legal

representative. He was convicted on 25 April 2012 and the same day sentenced to payment of a fine of R4 000,00 or 4 months' imprisonment.

[3] The presiding magistrate indicated on the charge sheet that the matter was not reviewable as the accused was represented by a legal representative.

[4] The imposed sentence is indeed not reviewable in the ordinary course in accordance with the provisions of section 302(1) of the Act, read with section 302(3) thereof, insofar as the accused enjoyed legal representation. The record of proceedings and the relevant J4 form were forwarded to the High Court without the customary written request that the matter be dealt with as a special review. It was brought to my attention. It is therefore appropriate that the matter be dealt with in accordance with the provisions of section 304(4) of the Act.

[5] The applicable subsection of the Immigration Act is subsection 49(1)(a) which reads as follows:

“Anyone who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding three months.” (emphasis added)

The sentence imposed on the accused is not in accordance with justice and should be reviewed and set aside.

- [6] *Ex facie* the record accused’s legal representative addressed the court in mitigation, but his address was not recorded. The court *a quo* did not refer to the accused’s personal circumstances and his ability to pay a fine when sentence was imposed. Consequently it is not clear from the transcribed record whether the accused was in a position to pay a fine and if so, in which amount. However, attached to the transcribed record is a receipt indicating that the accused paid the amount of R4 000,00 in cash at the cash hall of the Bloemfontein Magistrate’s Court on 25 April 2012, the date on which he was sentenced. In the circumstances I deem it unnecessary to reconsider the fine imposed.

[7] As the court *a quo* could not impose four months' imprisonment as an alternative sentence it is necessary to interfere with this part of the sentence. The particular offence is prevalent, not only in the Bloemfontein district, but across the country. Illegal immigrants have a serious impact on the country in its economic and socio-economic spheres. A vast number of illegal immigrants appear frequently in our courts on serious charges such as murder and robbery. There is no reason not to impose, in the alternative, the maximum period of imprisonment, being three months.

[8] Consequently the following orders are made:

8.1 The sentence is reviewed, set aside and substituted with the following:

Payment of a fine in the amount of R4 000,00 or three months' imprisonment.

8.2 The sentence is antedated to 25 April 2012.

J. P. DAFFUE, J

I concur.

S. P. B. HANCKE, AJP

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