

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 498/2009

In the cases between:-

THE STATE

and

LEBOHANG MAKHETHA
MARAMANG DAVID MARITI
THSEDISO MAKGALE
NTHATUWA TAUHADI
LEBAKENG MATJEKA
SHANTI NKUNYANE

499/2009
497/2009
496/2009
494/2009
495/2009

CORAM:

CILLIé, J *et* JORDAAN, J

JUDGMENT BY:

JORDAAN, J

DELIVERED ON:

25 SEPTEMBER 2009

[1] The above matters were send to this court in terms of the provisions of section 304(4) of the Criminal Procedure Act, no 51 of 1977 for special review.

[2] All these matters were heard and disposed off by the magistrate of Wepener during January this year already. It is necessary to briefly deal with the record of proceedings as supplied by the

quality assurance senior magistrate in each of these cases. All the accused were charged with contravening the provisions of section 49(1)(a)(b) of the Immigration Act, no. 13 of 2002.

[3] In case 24 of 2009, State v Lebohang Makhetha, the record of the proceeding show that the accused's rights to legal representation were explained and that the accused elected to conduct his own defence. The typed record of the proceeding then contains the following: "Guilty, see J15 for completion. In mitigation accused states that he is alone at home and no one is presently looking after the children." The handwritten J15 shows that the accused pleaded guilty and was found guilty on the ninth of January 2009 and that section 112(1)(a) of the Criminal Procedure Act was applied. The accused was sentenced to a fine of R200,00 or 30 days imprisonment, conditionally suspended for a period of three years.

[4] Case number 51 of 2009, State v Maramang David Mariti in which, according to the record of proceedings the accused elected to conduct his own defence after his rights to legal

representation being explained and which record furthermore contains the following:

“Accused pleads guilty. Section 112(1)(a) applied.”

In mitigation;

“I have no one who pay for me, I am alone. I came here to look for work, I did not have passport.

See J15 for completion.”

The handwritten J15 is similar to the first mentioned case and the accused was sentenced to a fine of R300,00 or 30 days imprisonment conditionally suspended for 3 years.

[5] Case number 54 of 2009 (Wepener) S v Thsediso Makgale where the accused according to the record of proceedings also elected to conduct his own defence and the following is noted:

“Accused pleads guilty. Accused found guilty in terms of section 112(1)(a).”

In mitigation:

“Accused states that he is a first offender. Not married, 23 years.

Not working.

See J15 for completion.”

The accused was sentenced to a fine of R300,00 or 60 days imprisonment.

- [6] Case number 54 of 2009, State v Nthafuwa Tauhadi wherein, according to the record of proceedings, the accused also elected to conduct her defence. The record contains the following:

“Accused pleads guilty.

Accused found guilty in terms of section 112(1)(a)”

In mitigation:

“I am not married. I have children, two. One 11 years and 8 years.

Not working.

See J 15 for completion.”

The J15 again only records in the handwritten version thereof that the accused pleaded guilty and was found guilty after section 112(1)(a) was applied and whereafter the accused was sentenced to a fine of R300,00 or 60 days imprisonment.

- [7] Case number 56 of 2009, S v Lebakeng Matjeka where the accused elected to apply for legal aid and the case postponed for that reason. On the next occasion that the case was heard it appears that the accused appeared in person and the record again only states that the accused pleaded guilty and that section 112(1)(a) was applied. The handwritten form J15 shows that the accused pleaded guilty, was found guilty and sentenced to a fine of R300,00 or 30 days imprisonment conditionally suspended for a period of 3 years.

- [8] Case 74 of 2009, the State v Shanti Nkunyane, it appears that the accused was indeed represented. The record of proceedings contains only the following:

“Accused pleads guilty. Section 112(1)(a) explained. See J15 for completion.”

The accused was sentenced to a fine of R200,00 or 30 days imprisonment.

In regard to all the above matters the senior magistrate comments as follows:

“The record of proceedings in the above matter is defective and not in accordance with justice and on the following grounds: There is no indication on the record that the charge was ever put to the accused. The record is silent as to whether the accused understood the charge if it was put to him or her. No indication on the record that the prosecutor accepted the plea as tendered, the prosecutor not afforded the opportunity to prove previous convictions or to address the court on an appropriate sentence. Pre-sentence and post-trial rights/remedies not explained.”

[9] In regard to case number 56 of 2009, State v Lebakeng Matjeka the magistrate points out that, although the accused wanted to have legal representation, the matter was proceeded with on the

trial date without the accused being represented and without any indication as to whether the accused changed her mind and decided to conduct her own defence. The senior magistrate then concludes that the convictions and the sentences be set aside by this court.

[10] From the reading of the records in all the above-mentioned cases it does not appear that the charges were put to the accused nor that the prosecutor accepted the pleas and even less that the accused were asked whether they understood the charges before they were required to plead thereto. It furthermore does not appear that the accused's rights and choice regarding evidence in mitigation of sentence were explained at all. Save for the last-mentioned case, all the accused were unrepresented and most probably unsophisticated. It has already been pointed out in *State v Addabba*; *State v Ngeme*; *State v Van Wyk* 1992 (2) SACR 325 (T), that in such cases, it is not only desirable but necessary for the fair administration of justice that the magistrate conduct an inquiry as if it was a case under section 112(1)(b). Although one would not necessarily expect the full enquiry as

envisaged in the last mentioned section of the Criminal Procedure Act, one would at least expect that the magistrate would satisfy himself that the accused understands the charge against him or her, have sufficient knowledge of the nature of the charge and the implications thereof and most definitely ensure that the accused understands his rights in regard to mitigation of sentence before sentencing. The magistrate should at least have held an enquiry in regard to mitigation of sentence to elicit the relevant factors and circumstances that might be relevant to sentencing. None of that have been done in any of the above-mentioned matters.

[11] It is clear that the quality assurance, senior magistrate is correct in his view that none of the above-mentioned matters were in accordance with justice. It is highly unfortunate that these matters only came to the attention of the last mentioned senior magistrate at a late stage.

[12] In the result the convictions and sentences in all the above-mentioned matters are set aside.

A. F. JORDAAN, J

I concur.

C. B. CILLIÉ, J

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