

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Special Review No. : 294/2008

In the case between:

THE STATE

versus

1. **MQUSHAWANA SIPRIAN**
2. **BONGANE MLAMBO**
3. **AUDRY MAKARAPA**
4. **THABO NKEYANE**
5. **NOMZO SENOABILE**
6. **PARTSON MAGEZI**
7. **LEFALI MAPHIRI**
8. **THAPELO NTLALA**

CORAM: H.M. MUSI, JP *et* K.J. MOLOI, AJ

JUDGMENT: K.J. MOLOI, AJ

DELIVERED ON: 12 JUNE 2008

[1] The eight accused persons were each convicted and sentenced in the Magistrate's Court, Welkom, of the offences of trespass in contravention of section 1(1) of Act No. 6 of 1959 and theft from President Steyn Mine. They were all

legally represented. They all pleaded guilty to both charges and submitted statements in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977. They were each sentenced to twenty eight months imprisonment for trespass which was wholly suspended conditionally for a period of five (5) years and to a fine of R4 000.00 or eight (8) months imprisonment for theft wholly suspended conditionally for a period of five (5) years.

- [2] The magistrate referred the matter to this court as a special review in terms of section 304 A of the Criminal Procedure Act No. 51 of 1977.
- [3] This court cannot consider the matter under section 304 A of Act 51 of 1977 as the accused had already been sentenced. The said section authorises a review only after conviction but before sentence is passed when the magistrate “is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice.” If that is found to be the case by this court, the

conviction would be set aside and the matter remitted to the magistrate for a trial *de novo*.

[4] In the present matter the conviction was made in accordance with justice, the accused, being duly represented, having pleaded guilty and admitted all the elements of the crime charged.

[5] We dealt with the matter in terms of section 304 (2) of Act 51 of 1977 and found that the proceedings are not in accordance with justice in that the sentence of twenty eight months imprisonment wholly suspended conditionally for five years imposed by the magistrate in respect of each accused person on the count of trespass was in excess of the maximum sentence prescribed in section 3 of the Trespass Act, No. 6 of 1959. The said section prescribes the maximum sentence to be a fine of R2 000.00 or imprisonment not exceeding two years. Two years constitutes twenty four months.

[6] Section 304 (2) requires us to seek from the sentencing

magistrate the reasons for the sentence imposed and lay the record of the proceedings together with the statement consisting of the magistrate's reasons before a court consisting of two judges sitting as a court of appeal. The section contains a proviso that a court may dispense with a magistrate's reasons if it is of opinion that the sentence imposed is clearly not in accordance with justice and that the convicted person may be prejudiced if a further delay is allowed.

- [7] That the sentence is excessive of the prescribed maximum is obvious and the attendant prejudice to the accused persons is equally obvious. The matter was referred to this court by the magistrate himself presumably on realising that the sentence is not in accordance with justice, it being in excess of the legislated maximum. He did so under the section having no application to the proceedings. However, requiring him to state the reasons would result in an unnecessary delay and prejudice to the accused.

- [8] Section 304 (2) (c) of the Criminal Procedure Act 51 of 1977

authorises this court to interfere with the sentence imposed by the magistrate where such sentence is not in accordance with justice. As a consequence the following order is made:

- 1. The conviction on the charge of trespass is confirmed;**
- 2. The sentence on the charge of trespass is set aside;**
- 3. The following sentence on the charge of trespass is imposed in respect of each accused:**

“Sentenced to twenty four (24) months imprisonment wholly suspended for a period of five (5) years on condition that accused **is not found guilty of contravening section 1 (1) of Act No. 6 of 1959 committed during the period of suspension.**
- 4. The conviction and sentence on the charge of theft in respect of each accused are confirmed.**

K.J. MOLOI, AJ

I concur

H.M. MUSI, JP

/ms