

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE No: REV167/2024

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED: YES/N
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In the matter between:

THE STATE

versus

MANUEL CASTIGO COSSA

 REVIEW JUDGMENT

MULLER J:

[1] This case is subject to automatic review. The accused was convicted of contravening section 9(3)(a) of the Immigration Act¹ in terms a plea of guilty after being questioned in terms of section 112(1)(b) of the Criminal Procedure Act.² A sentence of 6 months imprisonment was imposed. An order in terms of section 34 of the Immigration Act that the accused is subjected to deportation after serving his sentence was added. The accused was not legally represented.

[2] At the very first appearance of the accused in court the charge was put to him by the prosecutor. The following appears from the record of the proceedings:³

"PROSECUTOR: First appearance, Accused appears in person. May I proceed to put the charge?

COURT: Yes you may proceed.

PROSECUTOR PUTS CHARGE TO THE ACCUSED: Court pleases

'Accused appears before court on a charge of immigration, entering the Republic from the Republic without valid documents in that on or about 13 September 2024 at or near Mokopane District Mogalakwana Accused being a Mozambique citizen, did unlawfully and intentional enter and remain in the Republic of South Africa without being in possession of a valid passport and or visa or visum an asylum's permit and or temporary residence permit.'

Court pleases.

COURT: Mr Gossa, is it Cossa or Gossa?

ACCUSED: Cossa

COURT: Cossa?

ACCUSED: K. Cossa for K [intervenes]

PROSECUTOR: C, see where already stating.

¹ Act 13 of 2002. (Hereinafter "the Immigration Act".)

² Act 51 of 1977. (Hereinafter "the CPA".)

³ Only the relevant portion of the record is quoted for purposes of the judgment.

COURT: Thank you, it is correct. Which language do you speak?

ACCUSED: Tsonga and Shangani.

COURT: Inform him of the charge.

INTERPRETER: Court pleases.

COURT: Do you understand the charge?

ACCUSED: Yes, I understand the charge.

COURT: Right, legal representative.

INTERPRETER: Court pleases.

ACCUSED: I will conduct my own defence.

Court: So in terms of the provisions of Section 60(11)(B) of the Criminal Procedure Act you have the duty to disclose to this court any previous conviction, nor pending cases against you. Failure of which if you charged convicted by the Court you will be sentenced to pay a fine of R40 000-00 or two-years' imprisonment.

ACCUSED: I understand. I was arrested in 2021 in April, I was found guilty for not having proper documents to be in the Country.

Court: And what was the sentence?

Accused: 12 Months.

COURT: Which court?

ACCUSED: Mokopane Court.

COURT: Any other previous convictions?

ACCUSED: That is the only previous conviction.

COURT: Any other outstanding warrants on your name?

ACCUSED: No warrant of arrest, yes.

COURT: So, you confirm you have one previous conviction, no pending outstanding warrants?

ACCUSED: confirmed, Your Worship.

COURT: State?

PROSECUTOR: Court pleases, both suggesting the, the date of 25 September for bail application. And the state intended plea is that of guilty, we may postpone it to the same date on the 25th, Court pleases.

COURT: I will take it the investigation is complete?

PROSECUTOR: Court pleases, investigations are complete.

COURT: I am informed by the state the investigations in this matter they are complete, therefore if you wish to apply for bail, bail at this stage is being opposed by the state.

ACCUSED: I understand.

COURT: Are you intending to apply for bail?

ACCUSED: If possible may I be released on bail.

COURT: You want to apply for bail?

ACCUSED: Yes.

COURT: I am inform, informed by the state to find out your intended plea to this matter as to how do you intent to plea to the charge?

ACCUSED: I plead guilty your Worship.

COURT: Suggested date either for bail or plea is the 25th of September 2024, is the date suitable to you?

ACCUSED: Yes, the 25th.

COURT: So, what do you intent to plead guilty on that day or do you want to proceed with bail?

COURT: I admit guilty Your Worship, and I would like to abandon bail and admit guilt.

COURT: State where do we postpone to Friday, the 18th we do not have Legal Aid in this Court.

PROSECUTOR: Yes, Your Worship I was under the impression that it going to opt for Legal Aid then side to be then but [intervenes]."

[3] When the case was submitted for review the magistrate was requested to explain what transpired on 16 September 2024 when the accused appeared in court for the first time after his arrest especially the purpose of questioning the accused in relation to his previous convictions and pending cases under pain of conviction and sentence.

[4] The magistrate replied in a memorandum that:

1.2 I respectfully submit that the Accused after his rights to legal representation were explained, elected to conduct his own defence. I then proceeded to explain to the Accused person the provisions of Section 60(11)(B) of the Criminal Procedure Act 51 of 1977 in order to determine the Accused's intention pertaining to a possible bail application and the schedule applicable to the bail application."

2.2 I respectfully submit to the Honourable Review Judge that the Accused was not required to plead to the charge on 16 September 2024. The charge was put to him on his first appearance on order for the charge to be explained and for me to be satisfied the Accused understood the charge that he was facing.

2.3 I enquired from the Accused what his intended plea was after the Prosecution informed me that the bail application is opposed and requested me to enquire about the Accused's intended plea. I respectfully submit that upon my enquiry the Accused informed me that he intends to plead guilty to the charge he is facing."

[5] A simple reading of the record does not bear out the proffered explanation by the magistrate. A criminal trial normally commences when the charge is put to the accused and when he is required to plead.⁴ When the accused appeared for the first time, the

⁴ Section 75(1)(a) read with section 105 of the CPA.

magistrate allowed the charge be read to the accused.⁵ It is, therefore, accepted that the purpose of which was simply to inform the accused of the charge against him at that early stage of the proceedings.⁶

[6] However, the magistrate then commenced with a pre-trial procedure without first explaining to the accused that he has the right to legal representation and without determining if he wishes to obtain the services of a legal representative. Section 35(3)(f) reads:

"Every accused person has a right to a fair trial, which includes the right-

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly."

The magistrate only stated: 'Right, legal representative' to which the interpreter responded: 'Court pleases'.

The magistrate apparently expected from the interpreter to explain the right to legal representation to the accused in the language that the accused understood. The accused replied: 'I will conduct my own defence.' The reply of the accused can only be correctly understood if the actual explanation which the magistrate should have given to him was recorded. It is incumbent upon the magistrate to explain the rights of an accused on the record.⁷ It is prerequisite for an accused to be made aware of his rights prior to him/her making an election that will have legal consequences. It cannot be left to the interpreter to perform that duty on his/her own. It is the duty of an interpreter to interpret from English into the indigenous language used by the accused and *vice versa* of what was said during the proceedings.

⁵ The court instructed the interpreter, to inform the accused of the charge in the language used by the accused and enquired from him if he understood the charge.

⁶ Section 35(3)(a) of the Constitution.

⁷ *S v Pienaar* 2000 (2) SACR 143 (NC) 146i-j and 148h.

[7] At the subsequent trial, the magistrate explained the right to legal representation before the accused was requested to plead. The omission to explain the right at his first appearance in my view was sufficiently cured by the explanation given to him at the trial.

[8] The accused, being a foreigner and, moreover, a lay person, is unfamiliar with the provisions of section 60(11)(B). Up to that point the accused has neither given an indication, on record, that he wished to apply for bail, nor has the prosecution indicated on record that bail is opposed. It would have been impossible for the magistrate, when he referred the accused to section 60(11)(B), to have knowledge that the accused wanted to apply for bail or that bail is being opposed by the prosecution. The magistrate without any prior explanation with regard to the right to bail⁸ or the reason why the provisions of section 60(11)(B) are applicable to the accused, informed the accused that he must disclose any previous convictions and pending cases against him, the failure of which may attract a fine of R40 000 or two years imprisonment. The accused promptly replied that he has a previous conviction for not having the proper documents and that he was sentenced to twelve months imprisonment.

[9] The impression was created with reference to the provisions of section 60(11)(B), that the accused was required to immediately disclose his previous convictions and outstanding cases under pain of payment of a fine of R40 000.00 or imprisonment of two years. It is not surprising that the accused provided the required information on the spot.

⁸ Section 50(6).

[10] There could, not have been any doubt in the mind of the magistrate, from the particulars of charge put to the accused, that neither Schedule 5 nor Schedule 6 of the CPA were applicable to the bail proceedings in the present case.

[11] The explanation by the magistrate in this regard is less than impressive. It will be recalled that section 35(3)(h) of the Constitution declares:

"Every accused person has a right to a fair trial which included the right - to be presumed innocent, to remain silent, and not to testify during the proceedings."

Didcott J in *S v Ntuli*⁹ affirmed that section 25(3) of the Interim Constitution¹⁰ introduced the general principle that criminal trials be conducted in conformity with the notions of basic fairness and justice which has broadened the rules that regulate the conduct of criminal trials.¹¹ This principle is firmly embedded in our Constitution and our jurisprudence.

[12] The practise (if it is practise in that court) that an undefended accused person at his/her first appearance, has to divulge, for the benefit of the prosecution, how he/she going to plead at the trial is to be deprecated. It is an encroachment upon the right of an accused to remain silent as well as the right against self-incrimination and it deprived the accused of the right to be presumed innocent.

[13] The record of the proceedings was referred to the Deputy Director to comment on the procedure adopted by the magistrate when the accused appeared in court on the first occasion and also if the accused was correctly convicted on his plea of guilty. I am grateful to counsel for their very helpful comments. It bears mentioning that the Deputy Director of Public Prosecutions is of the view that the conviction and sentence should be set aside due

⁹ 1996 (1) SA 1207 (CC) par 1; *Director of Public Prosecutions Natal v Magidela and Another* 2000 (1) SA 458 (SCA) par 19.

¹⁰ Act 200 of 1993.

¹¹ *S v Zuma and Others* 1995 (2) SA 642 (CC) 651J-652A.

to the failure of the magistrate to explain the right to legal representation at his first appearance and his failure to explain the right to be released on bail as well as the fact that the accused disclosed a defence when he was questioned in terms of section 112(1)(b).

[14] On 18 September 2024 when the accused appeared again before court, the magistrate proceeded to explain his right to legal representation. The accused was also informed that he has the right to appoint his own attorney or to apply for legal aid if he is financially unable to pay for such services. The accused elected to conduct his own defence. The accused then entered the promised plea of guilty. The accused, after he had entered the plea of guilty, was informed that he has the right to remain silent and that he is not compelled to answer questions. The accused elected to answer questions put to him. At that time his right to silence had already been infringed, and the question only paid lip service to the right.

[15] The accused was charged with contravening section 9(3)(a) read with section 49(1) of the Immigration Act. Section 9(3)(a) provides that:

"No person shall enter or depart from the Republic-

(a) unless he or she is in possession of a valid passport, and in the case of a minor, has his or her own passport".

The section, on a plain reading thereof, applies equally to citizens and foreigners who enter into or depart from the Republic and would have applied to the accused if he entered the Republic without a valid passport.

[16] Section 49(1)(a) reads that:

"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 to imprisonment not exceeding two years." (my italics.)

Section 49(1)(a) is the penal provision in respect of acts which are prohibited in terms of various provisions of the Act that relate to persons who enter, remain in, or depart from the Republic. Broome JP in *R v Hoff* explained that:¹²

"There are many statutes which, after enjoining certain acts and forbidding others, provide in a penal section that any person who contravenes any section shall be guilty of an offence. It may be said in a loose way that it is the penal section which creates the various offences. But in truth this is not so. To allege an offence under such a statute it would clearly be necessary to set out the conduct on the part of the accused which the Crown claimed to constitute an offence under the penal section... It follows that the conduct alleged against the accused must be conduct which if proved will constitute an offence."¹³

[17] When the accused was questioned in terms of the provisions of section 112(1)(b) of the CPA he said that he entered the Republic in possession of a passport which was valid until 14 September 2023 and stamped on 14 August 2023 at the border. When he was asked what type of permit he was using, the accused replied that he was not using a permit. He explained that he was not issued with a permit when he entered the Republic and that he has failed to return to his country of origin after expiry of his passport. The magistrate was satisfied that all the elements of the offence have been admitted and convicted the accused as charged and also imposed a sentence.

[18] The charge sheet, as framed, impermissibly conflated section 9(3)(a) and 9(4)(a) or 10(1) Section 9(4) states that:

¹² 1954 (4) SA 290 (N) 292A-C.

¹³ *R v Mohaleomathe and Others* 1944 OPD 117.

"A foreigner¹⁴ who is not the holder of a permanent residence permit contemplated in section 25 may only enter the Republic as contemplated in this section if-

- (a) his or her passport is valid for a prescribed period; and
- (b) issued with a valid visa, as set out in this Act."

Section 10(1) provides:

"Upon admission¹⁵, a foreigner, who is not a holder of a permanent residence permit, may enter and sojourn in the Republic only if in possession of a visa issued by the Director-General for a prescribed period."

[19] The accused was not asked when questioned in terms of section 112(1)(b) whether he is the holder of a permanent residence permit, the absence of which is a necessary element of an offence under section 9(4) or 10(1). His answers rather revealed that he entered the Republic at a port of entry with a valid passport (which is a valid defence to contravening section 9(3)(a)), but without a valid visa and that he remained in the Republic after his passport has expired. The accused, on his own admission, is an illegal foreigner to which section 32(1) applies. It provides that:

"Any illegal foreigner¹⁶ shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status."¹⁷

[20] I am of the opinion that the conviction cannot stand and that the criminal proceedings before the magistrate, cumulatively viewed, failed to meet basic tenets of a fair trial envisioned by the Constitution.

¹⁴ In terms of section 1 of the Immigration Act: "'Foreigner" means an individual who is not a citizen."

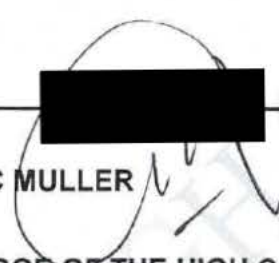
¹⁵ "'Admission" means entering the Republic at a port of entry in terms of section 9."

¹⁶ "'illegal foreigner" means a foreigner who is in the Republic in contravention of this Act."

¹⁷ "'status" means the status of the person as determined by the relevant visa or permanent residence permit granted to a person in terms of this Act."

ORDER

1. The conviction and sentence are set aside.

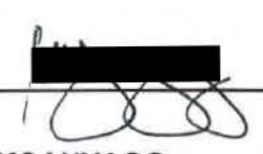



G.C MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

I, concur




M.F KGANYAGO

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE