

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 89/2010

In the review between:-

THE STATE

versus

NATHALI MOLELEKI

CORAM: MOLEMELA, J et LEKALE, AJ

JUDGMENT BY: LEKALE, AJ

DELIVERED ON: 25 MARCH 2010

- [1] This matter came before me by way of an automatic review in terms of section 302 read with section 304 of the Criminal Procedure Act no 51 of 1977 (CPA) as amended.
- [2] On going through the record of the proceedings held at the Magistrate's Court, Hennenman on the 11th November 2009 and the 3rd February 2010, I noticed the following:
- [2.1] that the accused was, *inter alia*, sentenced to 60 (sixty) days direct imprisonment on a charge of contravention of section 49 (1) (a) read with sections 1,10,25 and 26 of the Immigration Act no. 13 of 2002 viz. charge no. 5:

- [2.2] that the accused pleaded guilty to the said charge, among others, and was not questioned in terms of section 112 (1) (b) of the CPA before he was convicted on the said charge;
- [2.3] that the charge sheet viz. J15 indicated that the state prosecutor requested that the relevant charge, together with another charge, be dealt with in terms of section 112 (1) (a) of the CPA at the commencement of the plea proceedings.
- [2.4] that the accused was further sentenced to 4 (four) months imprisonment in respect of possession of unwrought precious metal viz. charge no.2 and to 15 (fifteen) months imprisonment for, effectively, theft of the same on charge no. 1.
- [3] I, thereupon, directed a query in the foregoing regard to which the Magistrate has since responded. In this regard I am grateful to the Magistrate for prompt and adequate response.
- [4] The Magistrate effectively attributed the discrepancy in respect of charge no. 5 to a mistake on his part, for which he apologised profusely, and pointed out that:
- [4.1] the normal sentence for the charge in question is usually a fine of R1000-00 or 60 days imprisonment;
- [4.2] he was under the wrong impression that he used section 112 (1) (b) of the CPA when he passed

sentence because the same was imposed some months after the conviction as a result of a delay in securing the accused's record of previous convictions viz. SAP 69;

[4.3] the state, in fact, requested the use of section 112 (1) (a) procedure and the Court could, therefore, only impose **“a sentence with an option of a fine”**

[5] In conclusion the Magistrate submitted that the sentence imposed could not stand and requested that the same be set aside and **“be replaced by a sentence with an option of a fine as [he] should have done”**

[6] I am in respectful agreement with the Magistrate insofar as section 112 (1) (a) of CPA provides that:

“Where an accused in a summary trial in any Court pleads guilty to the offence charged or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-

(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine....convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and –

(i) impose any competent sentence , other than imprisonment or any other form of detention without the option of a fine....”

[7] I am , therefore, not satisfied that the proceedings were in accordance with justice to the extent that a sentence of 60 days imprisonment was imposed without an option of a fine. It would, further, have been in accordance with the requirements of justice for the sentences in respect of charges 1 and 2 as well as charge no. 5 to run concurrently.

ORDER

[8] In the result the convictions are confirmed.

[9] The sentence on charge no. 5 viz. contravention of section 49 (1) (a) of the Immigration Act no. 13 of 2002 is, hereby, set aside and the following sentence is imposed in its place and stead:

“On charge no.5 the accused is sentenced to 60 (sixty) days imprisonment or a fine of R1000-00”

[10] The above sentence is antedated to run from the 3rd February 2010.

[11] The said sentence and the sentence imposed in respect of charge no.2 viz. Possession of Unwrought Precious Metal are to run concurrently with the sentence in respect of charge no.1 viz. Theft.


L J LEKALE, AJ

I concur,



M B MOLEMELA, J