



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	<u>YES</u> / NO
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

**HIGH COURT REF NO: 06/2017
MAGISTRATE CASE NO: C236/17**

In the matter between:

THE STATE

And

ARRISON WHITE

REVIEW JUDGMENT

DJAJE J

[1] This matter was sent on special review on 27 November 2017 by the Senior Magistrate of Moretele Court with the following request:

- “1. I hereby refer to above mentioned matter.*
- 2. Please find attached matter for special review.*

3. *The Presiding Officer has written a self-explanatory letter which is attached*
4. *Your decision will be appreciated in this matter.”*

[2] The letter referred to above by the Presiding Officer states as follows:

- “1. please be informed that on 24 October 2017 and the above named accused was represented by Legal Aid.*
- 2. The accused was charged with contravening the provisions of Section 34(6) of the Immigration Act 13 of 2002.*
- 3. The Accused pleaded guilty and a statement in terms of section 112(2) of Act 51 of 1977 was prepared and read into the record.*
- 4. The court accepted the statement and convicted the accused. When the court stood down the matter, to check the penalties as provided for in terms of the Immigration Act, Act 13 of 2002 and upon reading the said section, the court realised that the accused has been charged and convicted with a wrong section.*
Section 34(6) of Act 13 of 2002 provides that; “Any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his or her sentence and his or her imprisonment shall be terminated at that time”.
- 5. A copy of the transcribed record has been requested as a matter of urgency.*
- 6. I am therefore of the view that this matter should be sent on special review based on the following;*
 - 6.1 The accused has been charged and convicted on a wrong section.*
 - 6.2 The District court does not have Jurisdiction to adjudicate on matters relating to deportation of illegal immigrants.”*

[3] Section 304 (A) (a) of the Criminal Procedure Act 51 of 1977 sets out the procedure in review matters before sentence and provides that:

“a. *If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303.*”

[4] The issue that arises from the letter by the Magistrate is that the accused in this matter has been charged and convicted of a wrong section which is section 34(6) of the Immigration Act 13 of 2002. This section as referred to above in the letter from the Magistrate does not create an offence. In terms of the Immigration Act the section that creates an offence is section 49(1) (a).

[5] Section 49(1) (a) of the Immigration Act provides as follows:

49. Offences

(1) (a) *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.*

[6] The state in this matter should have invoked the provisions of section 49(1) (a) of the Immigration Act as provided above. The Magistrate only realised this after conviction and could not invoke

the provisions of section 86(1) of the Criminal Procedure Act to have the charge sheet amended. In the case of **S v Ganqa [2005] JOL 16248 (E)** the following was stated in the relation to a defective charge:

“This was not a defect which occurred during questioning of the accused on his guilty plea. The review court is then required to remit the matter to the magistrate. Here the charge was hopelessly defective, No notice of any offence was in effect given to the accused. He was put to considerable trouble and inconvenience. More than two years has lapsed since the offence. In those circumstances, fairness dictates that should the State deem it desirable to resume these proceedings, they prosecute afresh.”

- [7] The accused stands to be prejudiced as he was not appraised of the correct legal position and is now convicted of an offence which does not exist. In my view the proceedings were not in accordance with justice and the conviction should be set aside.

Order

- [8] Consequently, the following order is made:
1. The conviction is set aside;

J. T. DJAJE
JUDGE OF THE HIGH COURT

I agree

A. M. KGOELE
JUDGE OF THE HIGH COURT

DATE: 14 December 2017