

SOUTH AFRICA / JUDGMENT

S v Mahako (403/2011) [2012] ZAFSHC 83 (3 May 2012)

[2012] ZAFSHC 83

COURT

Free State High Court, Bloemfontein

BEFORE

Lekale, Mhlambi

CASE / FILE NUMBER

403/2011

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Review No. : 403/2011

In the review between:

THE STATE

versus

THABO MAHANKO

CORAM: LEKALE, J et MHLAMBI, AJ

JUDGMENT BY: LEKALE, J

DELIVERED ON: 3 MAY 2012

- [1] The accused, a Lesotho National, was convicted of and sentenced for dealing in dagga and being an illegal foreigner in the Republic of South Africa by the Ficksburg Magistrates' Court on 1 August 2011.
- [2] He pleaded guilty on both charges and the charges were taken together when he was sentenced to R3 000,00 or 18 (eighteen) months imprisonment with a further 18 (eighteen) months imprisonment being conditionally and wholly suspended for 4 (four) years.

[3] In convicting the accused on charge 2 for being an illegal foreigner in contravention of section 49(1)(a) of Immigration Act No. 13 of 2002, the trial court invoked the provisions of section 112(1)(a) of the Criminal Procedure Act No. 51 of 1977 (CPA). The matter, thereafter, served before my sister Naidoo AJ on automatic review and she felt uncomfortable with the sentence imposed in the light of the

applicability of section 112(1)(a) of the CPA. She, therefore, directed the following query to the trial magistrate:

“Whether the consideration of counts 1 and 2 as one count for the purpose of sentence is proper, in view of the limitations on sentencing

prescribed in Section 112(1)(a).”

[5] The learned magistrate has since responded for which the court is grateful. In response the trial magistrate, inter alia, points out that:

“... the sentence in my view [is] proper because it is not prejudicial to the accused... and I [am] of the view that the limited sentence in terms of section 112(1)(a) of Act 51/1977 is in any event superceded by the sentencing jurisdiction of the Drugs and Drug Trafficking Act 140/1992.”

[6] The learned magistrate further opines that the sentence is both proper and advantageous to the accused and it did not vitiate the proceedings at all.

[7] It is true that the practice of taking offences together for sentencing purposes is well-founded and generally advantageous to accused persons insofar as it avoids duplication of sentences and resultant undue harshness where, inter alia, justice demands that the offences be viewed as one transaction by imposing a composite or joint sentence. (See *FOURIE v S* [2001] 4 ALL SA 365 (SCA) at par. [20].)

[8] The foregoing opinion by the trial magistrate, however, with respect, misses the point. The question is whether or not the trial court, in law, has the power to impose the sentence in question where it invokes the provisions of section 112(1)(a) of CPA. The view in question, further, with due respect, loses sight of the fact that, in law, the composite sentence imposed should be competent in respect of each of the offences involved when looked at individually. (See *S v S* 1981 (3) SA 377 (A) and *S v HAYMAN* 1988 (1) SA 831 (NC).)

[9] The trial magistrate correctly concedes that the invocation of section 112(1)(a) procedure limits the penal jurisdiction of the trial court and that the sentence imposed herein exceeds that limit.

[10] In the circumstances of the present matter where the severity of the sentence competent for dealing in drugs exceeds the penal jurisdiction of the court in respect of the offence of being an illegal foreigner, the proper approach, in my view, is that separate competent sentences be imposed in respect of each offence and the severity of their cumulative effect be tempered by making them to run concurrently, where appropriate, or by imposing a suspended sentence in respect of one of them. (See *Kriegler and Kruger: Hiemstra’s*

Criminal Procedure at 28-41.)

[11] I am satisfied that the convictions are in accordance with justice but that the sentence imposed is, however, a nullity in law and falls to be corrected. (See *S v NTULI* 1975 (1) SA 429 (A) at 435 C.)

[12] ORDER:

For the foregoing reasons the convictions are confirmed and the sentence of the trial court is set aside and in its place and stead is substituted the following:

“Charge 1: The accused is sentenced to R3 000,00 fine or 18 (eighteen) months imprisonment with a further 18 (eighteen) months imprisonment

suspended in whole for 4 (four) years on condition that the accused is not convicted of contravention of section 5(b) of the Drugs and Drug Trafficking Act No 140/1992 committed during the period of suspension.

Charge 2: The accused is sentenced to a R500,00 (five hundred rand) fine or 10 (ten) days imprisonment which is suspended in whole for 3 (three) years on condition that the accused is not convicted of the contravention of section 49(1)(a) read with sections 1, 10, 25 and 26 of the Immigration Act No 13 of 2002.”

[13] The sentences are antedated to take effect from 1 August 2011.

L.J. LEKALE, J

I concur.

J. J. MHLAMBI, AJ

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