

SOUTH AFRICA / JUDGMENT

S v Masemola (A886/14) [2014] ZAGPPHC 955 (24 November 2014) [2014] ZAGPPHC 955

COURT

North Gauteng High Court, Pretoria

BEFORE

D.P.J Rossouw, A.P. Ledwaba

CASE / FILE NUMBER

A886/14

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

THE STATE

v/s

NKOSINATHI

MASEMOLA.....Accused.

JUDGMENT

ROSSOUW AJ.:

- [1] 1.1. In this matter accused was convicted on a charge of housebreaking with intent to steal and theft by a Magistrate and sentenced to eight years imprisonment of which he was ordered to serve at least half of the term before being eligible for parole. In terms of Section 103 of Act 60 of 2000, he was also declared unfit to possess a firearm.
- 1.2. The accused was legally represented at his trial by an attorney Mr. Tsotetsi.
- [2] After conviction and sentence it appears that the matter was submitted in the ordinary course by the magistrate for review by a judge of this Division in terms of Section 302 (1) (a) (i) of the Criminal Procedure Act No. 51 of 1977.
- [3] The matter was considered by the Honourable Acting Judge Mr. Goody who on the 1st July 2011 signed the certificate that the proceedings appear “to be in accordance with justice”.
- [4] Thereafter on the 25th August 2014 the magistrate wrote to the Honourable Acting Judge Goody, informing him that the sentenced imposed exceeded the magistrates jurisdiction which was limited to 3 years. And requested that the sentence imposed be reconsidered.

- [5] In response to the magistrate's request the Honourable Acting Judge Goody wrote a review judgment in terms of which he reduced the term of imprisonment to three (3) years of which the accused must serve at least three (3) years (the full term).
- [6] The Registrar brought the matter to the attention of the Honourable Depute Judge President on account of the fact that the judgment of the Honourable Acting Judge Goody had been signed by him alone.
- [7] The Honourable Deputy Judge President thought it prudent to refer the matter to the Director of Public Prosecutions, Pretoria with the following request:
- "Kindly let me have your comments and recommendation urgently as to how the matter should be dealt with in addition, please comment on whether the High Court still has jurisdiction to deal with the matter as an automatic review".*
- [8] The response to the above request has now been received from the Senior State Advocate A.P. Wilsenach, countersigned and supported by the Deputy Director of Public Prosecutions, Advocate H.E. van Jaarsveld.

This Court is indebted to them for the thorough and very helpful memorandum provided.

- [9] It is abundantly clear that the matter in casu was from its inception not reviewable in terms of Section 302 (1) (a) (i) of Act 51 of 1977, on account of the provisions of Section 302 (3) (a) of the aforesaid Act; the accused having been represented by a legal adviser.
- [10] It is also undoubtedly so that the imposed sentence of eight (8) years is clearly not in accordance with justice, such sentence being one beyond the jurisdiction of the court that imposed it.
- [11] It is therefore clear that the certificate declaring the proceedings to be in accordance with justice cannot stand since it is clearly wrong and must be set aside or revoked.

That a certificate issued by one judge may be revoked by another judge in appropriate circumstances is beyond doubt.

See: STATE v. MASEKO 1971 (4) SA 475 (T);

STATE v. MAKEBE 1967

(1) SA 464 (N);

STATE v. NKOSI (1); NKOSI(2) and MCHUNU 1984 (4) SA 94 (T)

- [12] It is also clear that this matter cannot be dealt with as an "automatic" review in terms of Section 302 (1) (a)
- (i) of Act 51 of 1977.

[13] In my view the answer to the problem now under consideration, lies in the provisions of Section 304 (4) of Act 51 of 1977, the relevant part of which reads as follows:

“304

(4) If any criminal case in which a magistrate’s Court has imposed a sentence which is not subject to review in the ordinary

course in terms of Section 302 ... it is brought to the notice of the provincial division... having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of Section 303, or this Section”.

[14] 14.1. The accused admitted a number, at least three, previous convictions over the period 2001 to 2012. In 2007 he had been sentenced on a Housebreaking charge to five years imprisonment and in June 2012 on a charge of theft to 12 months imprisonment.

14.2. The accused is now 29 years of age and the father of a child aged 13 years. He is unemployed but does “piece” jobs.

14.3. The trial magistrate took into account the previous convictions of a similar nature; that the offence of Housebreaking with intent to steal and theft is prevalent in the community and has a negative impact on the community; that accused has pleaded guilty and showed remorse.

14.4. The court found that as the accused had on two previous occasions been released on parole the circumstances indicated that a further possibility of early parole should be avoided by prescribing a minimum of the sentence to be served before he could be considered for parole.

14.5. Circumstances as outlined above demand a stem sentence requiring a term of three years to be served without being considered for parole. This will serve the interests of both the community and, strange as it might sound, also the interests of the accused.

[15] In my view, considering all the circumstance and having given careful consideration to all material aspects:

15.1. the certificate by the Honourable Acting Judge Goody dated the 30 June 2014 as well as his review judgment dated the 3rd October 2014 should be revoked and set aside respectively.

15.2. The sentence of eight (8) years imprisonment with the provisions attached to it, should be set aside and be replaced by the following:

“The accused is sentenced to 3 years direct imprisonment antedated the 25th April 2014.”

D.P.J ROSSOUW

ACTING JUDGE OF THE

HIGH COURT,

(GAUTENG DIVISION).

I agree. IT IS SO ORDERED.

A.P. LEDWABA

DEPUTY JUDGE PRESIDENT

OF THE HIGH COURT,

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