

SOUTH AFRICA / JUDGMENT

S v Mohata (40/2015) [2015] ZAFSHC 91 (21 May 2015)

[2015] ZAFSHC 91

COURT

Free State High Court, Bloemfontein

BEFORE

A. Kruger, C. J. Musi

CASE / FILE NUMBER

40/2015

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FREE

STATE HIGH COURT,

BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

Review

No: 40/2015

In

the review of:

THE
STATE
and
RAMOSOEU JOEL
MOHATA

CORAM:

KRUGER et
CJ MUSI , JJ

JUDGMENT

BY: KRUGER, J

DELIVERED ON: 21 MAY 2015

- [1] This is a special review under section 304(4) of Act 51 of 1977. The accused was charged with a contravention of section 49(1) of the Immigration Act 13 of 2002 for being in the Republic illegally. On 15 December 2014 he was convicted solely on his plea of guilty under section 112(1)(a) of Act 51 of 1977 and sentenced to a fine of R800 or four months' imprisonment.

The magistrate says that he was subsequently made aware that the maximum period of imprisonment that can be imposed under section 112(1)(a) is three months, and for that reason the imposed four months' imprisonment is incompetent. I raised the question why the magistrate believes the maximum period of imprisonment is three months. The acting Senior Magistrate responded by stating that the maximum fine determined by the minister for purposes of section 112(1)(a) is R5 000. The Senior Magistrate points out that no provision is made for a period of imprisonment to be imposed as an alternative to the fine. The Senior Magistrate refers to section 287 of Act 51 of 1977 which provides for the imposition of a term of imprisonment as an alternative in the event of non-payment of a fine. Section 287 does not prescribe any proportion between the fine and the alternative imprisonment.

- [2] The Senior Magistrate refers to section 92(1)(b) of the Magistrates' Courts Act 32 of 1944 and says in terms thereof the maximum fine within the jurisdiction of a district court is R60 000 and the maximum period of imprisonment is three years. The Senior Magistrate applies this ratio as follows:

R60 000 = 3 years

R40 000 = 2 years

R20 000 = 1 year

R10 000 = 6 months

R 5 000 = 3 months

(The Senior Magistrate overlooks the fact that since 1 June 2014 the maximum fine which a district court can impose is R120 000 (not R60 000) (See GN 217 of 27 March 2014 in Government Gazette 37477).)

- [3] The Senior Magistrate says the mere fact that section 112(1)(a) is silent on the term of imprisonment is no justification for the imposition of any term of imprisonment. He submits that the term of imprisonment should be proportionate to the maximum amount permissible and the offence. The Senior Magistrate says that under section 112(1)(a) the maximum amount determined by the minister is R5 000, which equates three months according to the ratio. The fact that the maximum fine is in fact R120 000 removes the basis of the Senior Magistrate's reasoning. The Senior Magistrate says any term of imprisonment in excess of three months would be disproportionate to the maximum fine of R5 000 and would also be in conflict with the purpose for which section 112(1)(a) was enacted.

- [4] There is no necessary or prescribed correlation between the fine and the alternative imprisonment. There is no fixed correlation between a fine imposed and alternative imprisonment. Both the fine and the term of imprisonment are determined having regard to the circumstances of the case and the accused. For example, for an accused with a low income, a fine of R200 could have the same effect as a fine of R2 000 for a wealthy person. The punishment must fit the offender.
- [5] A point the Senior Magistrate overlooks is that section 92(1) of Act 32 of 1944 makes provision for the maximum limits for a fine as well as imprisonment. In contrast thereto, the minister's

proclamation for purposes of section 112(1)(a) prescribes only a maximum fine. It is silent on alternative imprisonment.

The court retains its discretion to impose appropriate alternative imprisonment.

- [6] A provision similar to section 112(1)(a) was contained in section 286(1)(a) of the Criminal Procedure and Evidence Act 31 of 1917 where the amount of the fine is stated as £15. Gardiner and Lansdown, in the South African Criminal Law and Procedure 5th Ed (1946) Vol I at 309 say that where the accused cannot pay the fine the real and effective sentence is in truth the alternative

imprisonment. The learned authors refer to a number of cases. In *R v Kom* 1936 CPD 201 the accused was convicted on her plea of guilty and sentenced to a fine of £15 or three months' imprisonment. Centlivres J (as he then was) remitted the matter to the magistrate because the magistrate had not given the accused an opportunity to address the court before sentence. The court also said:

"It is of interest to note that prior to the amendment of sec. 345 of Act 31 of 1917 the maximum term of imprisonment that could have been imposed as an alternative to the fine of £15 was one month, but under the new sec. 345 the terms of imprisonment need not now be in proportion to the fine."

Thus already in 1936 there was no prescribed proportion between the fine and the alternative imprisonment. Under section 287(1) of the Criminal Procedure Act 51 of 1977 there is no requirement that alternative imprisonment must be in proportion to the fine.

- [7] In the 1955 Criminal Procedure Act (Act 56 of 1955) section 258(1) dealt with conviction and sentence of an accused on a plea of guilty alone in its proviso. The maximum fine was £15 in 1967 (See *Suid-Afrikaanse Strafproses* by VG Hiemstra 1st Edition 1967 pages 330-331). In *S v Mojapela* 1960 (4) SA 278 (T) the accused was sentenced to a fine of £10 or two months' imprisonment with compulsory labour suspended for two years. On appeal it was contended that the case was too serious to be disposed of under section 258(1) of Act 56 of 1955. There was no reference to the proportion between the fine and alternative imprisonment. The court dismissed the appeal and confirmed the convictions and sentence.

- [8] Under section 112(1)(a) of Act 51 of 1977 there is no prescribed proportion between the fine and alternative imprisonment.

However, the fact that the alternative imprisonment of four months is competent does not mean that a court of appeal or review cannot interfere. In this case there is nothing to suggest that the sentence is inappropriate. There is no reason to believe that a sentence of three months as alternative to the fine would be appropriate, but four months would not be proper.

- [9] The Senior Magistrate is correct that section 112(1)(a) should be used only for minor offences. It is almost in the nature of an acknowledgement of guilt fine. The accused should, it can almost be said, stand with the money, ready to pay the fine or qualify for a deferred fine. Magistrates should rather, in appropriate cases, consider using section 112(1)(b) and ask a few simple questions to make sure of the guilt of the accused. Then sentencing becomes much simpler.

- [10] In conclusion, the alternative imprisonment of four months imposed in this case is not incompetent. The sentence is in order and the proceedings are confirmed as being in accordance with justice.

A. KRUGER, J

I agree.

C. J. MUSI, J

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