

SOUTH AFRICA / JUDGMENT

S v Motsoeneng (77/92) [1995] ZASCA 54 (19 May 1995)

[1995] ZASCA 54**COURT**

Supreme Court of Appeal

BEFORE

Hefer, Nestadt, Schutz

CASE / FILE NUMBER

77/92

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

CASE NO. 77/92

PINKIE MOTSOENENG APPELLANT VERSUS THE STATE RESPONDENT

CORAM: HEFER, NESTADT et SCHUTZ JJA

DATE HEARD: 15 MAY 1995 DATE DELIVERED: 19 MAY 1995

SCHUTZ JA

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JUDGMENT

SCHUTZ JA:

The appellant was convicted by a regional magistrate of contravention of section 51(a) of the Admission of Persons to the Republic Regulation Act 59 of 1972 as amended. The relevant parts of the section read:

"51 Any person who -

- (a) aids or abets any person in entering or remaining in the Republic or any province in contravention of this Act, knowing that such person is prohibited from entering or remaining in the Republic or such province;
- (b) ...

shall be guilty of an offence and liable on³

conviction to a fine not exceeding R10 000 or imprisonment for a period not exceeding five years or to both that fine and that imprisonment."

The appellant was convicted in 1989. The Act has since been replaced by the Aliens Control Act 96 of 1991. The circumstances charged and proved against her were that she aided and abetted a Mozambiquen, Roque Jossai, to remain in the Republic knowing that he was prohibited from remaining here, in that she supplied him with a false South African identity document.

The events on which the convictions are based occurred as long ago as 1988. Jossai gave evidence for the State. He had entered the Republic illegally in February 1988. Whilst walking down a Johannesburg street he came upon an acquaintance from Maputo. When

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the acquaintance heard of his predicament of having no papers he took him to premises in Bree Street where the appellant worked. Jossai told her that he was an illegal immigrant from Maputo and that he had been deported from South Africa on a prior occasion. She agreed to accommodate him for a fee of R120. He would have to bring her two photographs together with the money, which he later did. This happened in April 1988. In due course he received a false identity document from her.

Some time later he was arrested where he was working on a farm near Middelburg, the falsity of his document being apparent to the skilled eye of the police officer who arrested him.

By August 1988 he was persuaded to take part in a police⁵

trap. He went back to the appellant's premises and lied to her that he had lost his first document. Would she obtain another for him? She agreed. This time the fee was R280. Some time later she gave him another false identity document and was paid the balance of the R280. Upon her arrest R180 in marked notes, which had been handed to her in exchange for the document by Jossai, was found on her person.

She was convicted on both charges arising out of these two occasions. At her trial she pleaded not guilty and gave false evidence as to what had passed between her and Jossai and how she had come to be found in possession of the marked money.

Her appeal to the Witwatersrand Local Division against conviction failed.

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In its original 1972 form S 51 provided for a penalty of a fine of R2 000 or imprisonment for 12 months. By S 36 of the Aliens and Immigration Laws Amendment Act 49 of 1984 the penalty provisions were altered to the form set out above.

The sentence imposed by the regional magistrate was three years imprisonment taking both counts together for purposes of sentence. Her appeal against the sentence also failed, but the court a quo granted leave to appeal to this court on sentence only.

Mr Verster, appearing for the appellant, has urged upon us that the magistrate should have considered the alternative of a fine, even a heavy fine, or should have imposed a lesser period of imprisonment, or should have suspended the whole or a part of any imprisonment

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imposed. He has rightly stressed her personal factors, namely that she was a first offender, was 51 years old when the trial took place in 1989, and was in fixed employment. They are important. However, the magistrate took them into account.

Mr Verster abandoned an argument to the effect that the statute imposed a heavier sentence on the aider and abettor than on the principal, but then argued that as the appellant was only an aider and abettor there should be a measure of leniency. I do not agree with this argument.

The eyes of the legislature were clearly open to what it was doing when it laid down the penalties for aiding and abetting in 1972. Moreover, it is apparent that when the Act was amended in 1984 it was

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of the view that the mischief had to be addressed more sternly. Since then the mischief has not grown less. It has assumed huge proportions and creates a serious problem for the country. Returning to the aiding and abetting argument, I can well see the relative insufficiency of imprisoning an impoverished Mozambiquen who might find a short period of imprisonment well worth the risk. Any imprisonment, long or short would cost the State money and the tendency would be to deport the prisoner after a short time. The ones to deter are the South Africans who make illegal immigration by others easier and who, unlike the illegal immigrants would face the prospect of serving much of their sentence.

One may have sympathy with an illegal immigrant such as⁹

Jossai who is, after all, but trying to make a living by his labour. But national states have the right and the duty to protect their own citizens against illegal immigrants. Such an immigrant becomes another competitor for housing, hospitalisation and many other things in short supply. He might even succeed in casting a vote.

Persons who provide forged documentation to illegal immigrants are unlikely, usually, to be moved by charity. The purpose is gain, as it was in this case. A person like the appellant is a necessary cog in the system. She does not appear to be at the top of the organisation but she is not at the bottom either. I do not attach particular additional significance to the fact that she was convicted twice. But the two convictions do indicate that she regularly participated in the

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system. That is also indicated by the way in which the acquaintance from Maputo brought Jossai to her.

The degree of guilt of persons convicted under Section 51 (a) ranges broadly. In *S v Quinta* and another 1974 1 SA 544 (T) the appellants were acquitted on appeal for lack of proof of mens rea. However, the sentences that had been imposed by the magistrate were much less than those in the present case and this was relied on in argument. There are at least two reasons for not treating that case as any sort of guide. The first is that the circumstances of the offence were much less serious. The second is that the maximum sentence was much lower at the time. A true example of a person near the bottom of the scale is one who gives sustenance out of charity knowing that the

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recipient has no right to remain here. At the top of the scale of guilt is no doubt the master organiser, particularly if he has previous convictions. The maximum penalty should be reserved for that sort of man. There is nothing to indicate that the appellant is such a person, so that, particularly as she is a first offender her sentence should not be close to the upper limit, as the sentence imposed is.

The magistrate has not been shown to have misdirected himself, but I think that the appellant's proved position on the scale of guilt is such that a wholly unsuspended imprisonment of three years is so severe as to warrant interference.

However, the legislature treats the crime as serious, and in¹²

the particular circumstances it is aggravated by the facts that the motive was gain, not to assuage hunger, and the means fraudulent and hard to detect. I do not consider a fine appropriate as it is likely to be viewed as venture capital, and may well be paid by someone other than the appellant.

In all the circumstances I would allow the appeal and substitute a sentence of two years imprisonment, of which one year is suspended for five years on condition that the appellant is not convicted of a contravention of section 57 of the Aliens Control Act 96 of 1991 or section 51 of the Admission of Persons to the Republic Regulation 13 Act 59 of 1972 committed during that period.

W P SCHUTZ JUDGE OF APPEAL HEFER JA))CONCUR NESTADT JA)

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