

SOUTH AFRICA / JUDGMENT

S v Mudenda (CA&R 04/2021) [2021] ZAECGHC 5 (12 January 2021)

[2021] ZAECGHC 5

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Rugunanan, G H Bloem

CASE / FILE NUMBER

CA&R 04/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. CA&R 04/2021

Date

delivered: 12 January 2021

In

the matter between:

THE
STATE
and
CHAMPION
MUDENDA
(accused a quo)
REVIEW

JUDGMENT

RUGUNANAN, J

- [1] On 23-January 2020 the accused, a Zimbabwean national, appeared in the district court in Barkley East on a charge of contravening section 9(1) read with section 9(3) of the Immigration Act[1]. It was alleged that he entered and remained in the Republic of South Africa (hereinafter "South Africa" or "the country") without being in possession of any valid documentation, namely a passport. Under the general penal provision in section 49(1)(a) of

the Immigration Act (which renders the contravention of any provision in the Act an offence), a conviction for entering the country in contravention of the Act attracts a maximum penalty of a fine or imprisonment not exceeding two years. A magistrate's court is competent to impose this penalty.[2]

- [2] The accused was legally unrepresented. He elected to conduct his own defence and to enter a guilty plea. The magistrate questioned him in terms of section 112(1)(b)[3] of the Criminal Procedure Act.[4] Facts were elicited and accepted by the State whereafter the accused was convicted as charged. In my view he was properly convicted. He was thereafter sentenced to an effective 8 months' imprisonment. The matter comes before this Court on automatic review under section 302 of the Criminal Procedure Act.

THE SENTENCE

- [3] On 2 November 2020, the first judge tasked with this review requested the Director of Public Prosecutions ("the DPP") to provide an opinion on the suitability of the sentence imposed by the magistrate. Considering that case authority indicating the appropriate sentencing range for the particular offence is rare, I am indebted for the very informative input that has been provided.
- [4] In his carefully considered opinion, the DPP suggested the accused's sentence be reduced and substituted by a fine of R2 000 or 4 months' imprisonment. For reasons that will become apparent below, I am in respectful disagreement therewith. Factors such as the accused being a first offender, that he pleaded guilty and had been in this country for some 13 years so carving a life for himself and having fathered two children seemed to have weighed with the DPP in substantiating the suggested sentence. Also relevant for the DPP was that the magistrate did not consider the value of suspending a portion of the sentence for ensuring that the accused complies with the Immigration Act in future. The yardstick for the DPP's suggested sentence is the case of *S v Ntsonyane and Another* 2015 (2) SACR 70 (FB).
- [5] Respectfully, the judgment in that case does not sufficiently set out the facts. The matter involved a special review pursuant to the conviction and sentence of two accused in terms of the Aliens Control Act 96 of 1991, which Act was wholly repealed by the Immigration Act. The accused were charged and found guilty of contravening section 23(a) of the Aliens Control Act. They were within the borders of the country without being in possession of immigration permits. For each accused the magistrate imposed a sentence of a fine of R1 000 or 3 months' imprisonment. Since the accused were convicted and sentenced in terms of a repealed Act the matter was referred to the high court on special review to set aside the conviction and sentence. The high court declined to do so. Applying section 54 of the Immigration Act, the high court substituted the contravention of section 23(a) of the repealed Aliens Control Act by a contravention of section 9(4) of the Immigration Act in that neither of the accused was in possession of a valid passport and issued with a valid visa. The sentence for each accused was confirmed in terms of the general penal provision in section 49 of the Immigration Act.

[6] In the present matter there are mitigatory and aggravating features present. The accused, a mechanic by profession, had been in the country without proper documentation since 2006. His livelihood revolved in the area of Barkley East. Economic circumstances compelled him to leave Zimbabwe. Throughout his stay in this country he remained undetected by the South African authorities until 6 August 2019 when he was stopped at a roadblock while conveying passengers in a minibus taxi. He produced a driving licence. It was issued in Zimbabwe and on being requested to produce a passport he was unable to do so. During his stay in South Africa he knew that his presence was unlawful but made no attempt to notify the immigration

authorities and make application for the necessary documentation to legalise his presence. To expunge his unlawful presence in South Africa, he informed the magistrate that he went back to Zimbabwe to retrieve his passport but returned to South Africa without it. He is unmarried but has two children whom he supports and who reside with their mother. He was in custody for a period of 5 months while awaiting trial. He is also a first offender who pleaded guilty to the offence. The magistrate entertained doubt about whether the accused had shown remorse since he gave no indication that he would in future approach the immigration authorities with a view to obtaining legitimate documentation. On the facts, my observation is that the accused was an 'illegal foreigner'[5] at the time of his trial. He never stated that he was an 'asylum seeker'[6]. His prolonged undetection in South Africa could only have been possible through stealth. In this way he flouted the sovereignty of the South African state.

[7] The powers of a reviewing judge whether under section 302(1) or section 304(4) of the Criminal Procedure Act are akin to those of a court of appeal.[7] In *S v Jacobs* 2017 (2) SACR 546 (WCC) at paragraph [8] the position is stated thus:

"Although s 302(1)(a) is couched in terms of a review of the sentence which was imposed, and although review powers are ordinarily confined to considering whether there was any irregularity in the proceedings, because s 303 requires certification that the proceedings are in accordance with justice the reviewing judge is required to evaluate whether the entire proceedings i.e. those pertaining both to the sentence as well as the merits of the conviction are not only formally in order and regular, but also whether they are fair, and in doing so it has long been accepted that the reviewing judge exercises a function akin to that ordinarily exercised by an appellate court. As such, the process of automatic review is aimed at ensuring both the validity as well as the fairness of the underlying conviction and sentence and the powers of the reviewing judge are extremely wide and include not only the power to alter or reduce the sentence imposed but also the power to quash the conviction or to set aside or "correct" the proceedings or to make any other order which may promote the ends of justice. "

[8] In summary, as with the appeal procedure, the test to be applied by a review court entails not only whether the proceedings were technically sound but also whether they were in accordance with justice. If they were not, the review court would intervene.[8]

[9] There is nothing in the record of this matter which shows that the accused was procedurally and substantively deprived of a fair trial both on the merits of the conviction and the issue of sentence. I am satisfied that the proceedings before the magistrate are in accordance with justice and that it would not be necessary to alter

the sentence. Section 49 of the Immigration Act makes provision for a sentence of up to two years' imprisonment. I consider the accused's sentence of 8 months' imprisonment consistent with the aggravating features of the case and fairly lenient when compared with the maximum penalty in the section. To my mind the sentence imposed by the magistrate achieved a proportionate balance between the component considerations in the Zinn triad.[9]

DELAY

[10] The record of the proceedings in the district court was received by the registrar of this Court on 26 October 2020. The delay in the submission of the record amounts to 9 months from the date when the accused was sentenced. By the time of its receipt by the registrar the duration of the accused's sentence had expired. The circumstances giving rise to the delay are unknown. The transcript of the proceedings comprises of some 17 pages inclusive of the covering sheet and there is no indication on the transcriber's certificate of the date on which the transcription was completed. No attempt has been made to explain the delay nor has an apology been proffered. This reflects poorly on the administrative component of the district court concerned and on the magistrate who, in my view, ought to have maintained some oversight in ensuring timeous dispatch of the record to the registrar.[10]

[11] Matters sent to the high court on automatic review are inherently urgent. Section 303 of the Criminal Procedure Act is peremptory and lays down the time frame in which a record of proceedings must be forwarded to the registrar of the provincial or local division having jurisdiction. The element of urgency in review matters arises from the consideration that any delay might adversely affect an accused's constitutional

rights. These include the right to a fair trial and other rights such as the right to a trial without unreasonable delay, the right to dignity, freedom and access to court, and the right to appeal or review.[11] Had interference in the sentence been warranted, the delay for the accused would have had grievous implications for his constitutional rights and his material existence.

[12] Wherefore the following order is made:

[12.1] The proceedings before the magistrate in the court a quo are declared to be in accordance with justice in respect of both conviction and sentence.

[12.2] The sentence by the court a quo is confirmed.

M.S.RUGUNANAN

JUDGE OF THE HIGH COURT

I agree. It is so ordered.

G. H. BLOEM

[1] Immigration Act, 2002 (Act 13 of 2002)

[2] See definition of "court" in section 1

[3] See *S v Fransman and Another* 2018 (2) SACR 250 (WCC) at paragraph

[11] on the purpose of such questioning

[4] Criminal Procedure Act, 1977 (Act 51 of 1977)

[5] As defined in the Immigration Act.

[7] *S v Ntsonyane and Another* 2015 (2) SACR 70 (FB) at paragraph [38] wherein reference is made to section 322 of the Criminal Procedure Act, which provides that " .. no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in

the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such

irregularity or defect." See also paragraph [40] of the judgment for the appropriate test for establishing a failure of

justice.

[8] *S v Ntsonyane* supra at paragraph [39] and *S v Fransman and Another* supra at paragraph [23]

[9] *S v Zinn* 1969 (2) SA 537 (AD) at 540G-H

[10] See in this regard *S v Lewies* 1998 (1) SACR 101 (C) at 104b

[11] *S v Fransman and Another* supra at paragraph [27]

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