
SOUTH AFRICA / JUDGMENT

S v Shongwe and Others (1769/2015) [2015] ZAGPPHC 870 (5 November 2015) [2015] ZAGPPHC 870

COURT

North Gauteng High Court, Pretoria

BEFORE

A C Bekker, R G Tolmay

CASE / FILE NUMBER

1769/2015

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

SUPREME COURT REF NO: 429/15; 430/15; 431/15; 432/15 and 433/15

CASE NO: 1769/2015

MAGISTRATE's SERIAL NO: 10/15

DATE: 2 NOVEMBER 2015

5/11/15

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

THE STATE

Vs

AUGUST SHONGWE

ANTONIO MASHUVE

ADOLF SHIKOMO

CARLOS AMANDO

DENNIS DUZE

REVIEW JUDGMENT

BEKKER, AJ:

INTRODUCTION

- [1] The accused were all charged in separate matters in the Nelspruit Magistrate's Court with a contravention of Section 49(1) (a) of the Immigration Act 13 of 2002 for unlawfully entering and remaining in the Republic without valid documents or a passport.
- [2] All five of the accused(all first offenders) were convicted solely on their pleas of guilty under Section 112(1)(a) of Act 51 of 1977 and each sentenced to a fine of R 2000 or default of payment six months imprisonment. The same magistrate presided in all the matters.
- [3] All the matters were forwarded on automatic review as the accused were all undefended and more than three months imprisonment was imposed.

PROPORTIONALITY

- [4] On 18 September 2015, another reviewing judge requested the DPP's comment on the sentences.imposed.
- [5] The comments were duly received on 19 October 2015 by the Registrar. The OPP is thanked for its memorandum. The conclusion reached by the OPP in its memorandum is that the sentences imposed are in order and that proceedings are in accordance with the law. This conclusion is briefly based on the following grounds:
 - (a) Section 112(1) (a) of Act 51 of 1977 provides that the court may convict an accused on his plea of guilty provided that the presiding officer is of the opinion that the offence does not warrant punishment of imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette. Upon conviction any competent sentence may be imposed, other than imprisonment or any other form of detention without the option

of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or deal with the accused otherwise in accordance with law. The current maximum fine determined by the Minister for purposes of Section 112(1)(a) is R 5000(See GN R 62 in GG 3611 of 30 January 2013).Since 1 June 2014 the maximum fine which a district court can impose is R 120 000(See GN 217 of 27 March 2014 in GG 37477). The maximum period of imprisonment the district court can impose is three years.

- (b) Section 112(1) (a) is silent on the term of imprisonment that may be imposed as an alternative to a fine. The argument of the OPP is thus that there is no prescribed correlation or proportionality between the fine and the alternative period of imprisonment. Therefore for purposes of Section 112(1) (a) both the fine, as well as the period of alternative imprisonment (as long as the fine does not exceed R 5000 or the period of alternative imprisonment three years) are determined having regard to the circumstances of the case

and the accused. The Court retains its discretion to impose an appropriate alternative period of imprisonment. The argument of the DDP is in essence that the alternative period of imprisonment needs not be in proportion to the fine as there is no fixed proportion between the extent of the fine and the length of the imprisonment imposed as an alternative according to our law.

- (c) Section 49(1) (a) of Act 13 of 2002 provides that the accused is liable on conviction to a fine or to imprisonment not exceeding two years. The sentences imposed in the current matters are therefore competent.
- (d) Section 287(1) of Act 51 of 1977 which deals with fines and the fact that an alternative period of imprisonment can be imposed, also has no requirement that the alternative period of imprisonment must be in proportion to the fine.
- [6] The OPP is however losing sight of the applicability of the Adjustment of Fines Act, 101 of 1991. This Act is clearly applicable

in the current matters. The relevant sections of the Act read as follows:

1 Calculation of maximum fine

- (1) (a) If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92 (1)
- (b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in section 92 (1) (a) of the said Act, where the court is not a court of a regional division.
- (b) For the purposes of paragraph (a) a fine as well as imprisonment may be imposed.
- (2) If any law (irrespective of whether such law came into operation prior to or after the commencement of this Act) provides that any person may upon conviction of an offence be sentenced to pay a fine of a prescribed maximum amount or a maximum amount which may be determined by a Minister or, in the alternative, to undergo a prescribed maximum period of imprisonment, or be sentenced to such a fine and such imprisonment, the amount of the maximum fine which may be imposed shall, notwithstanding the said penalty clause, but subject to section 4, be an amount calculated in accordance with the ratio referred to in subsection (1) (a): Provided that this provision shall not apply if the maximum amount of the fine prescribed in the law or determined by the Minister exceeds the maximum amount calculated in accordance with the ratio referred to in subsection (1) (a).

4 Savings

This Act shall not apply in respect of a provision providing-

- (a) for the imposition of a fine in the case of an offence or omission which continues; or
- (b) that the court may impose such fine as it may in its discretion deem fit.

[7] The Act is applicable as the Immigration Act in Section 49(1)(a) thereof, makes only provision for a fine (not that the court may impose such a fine as it may in its discretion deem fit, which will exclude the Act's applicability in terms of Section 4) or imprisonment not exceeding two years. Applying the formula in Section 1 of the Adjustment of Fines Act to establish the proper ratio between the maximum fine and the maximum period of imprisonment, it will mean that the maximum fine in terms of Section 49(1)(a) of the Immigration Act will be R 80 000 or as alternative a maximum period of two years imprisonment. It is this court finding that this ratio between the maximum fine and the maximum period of imprisonment, serves as a valuable guideline (taking into account of course also all the relevant facts pertaining to sentence) when considering an appropriate alternative period of imprisonment for a fine to be imposed in terms of the relevant Act. Applying this ratio one would find that a fine of 40 000 or one year imprisonment seems to be in proportion as well as R 20 000 or six months imprisonment. On the face of it, a fine of R 2000 or by default of payment six months

imprisonment as in the current matters, seems to be disproportionate, the period of imprisonment seems to be too severe.

[8] It has been accepted since *R v Frans* 1924 TPD 419 that the amount of the fine has to bear some sort of relationship to the imprisonment. In *S v Tsatsinyana* 1986 (2) SA 504(T) the court held that the alternative sentence of imprisonment has a dual purpose, namely to ensure payment

of the fine and, in event of failure to pay, to serve as punishment for such failure.

[9] In *Sv Bokbaard* 1991(2) SACR 622(C) it was decided that if the fine is imposed to keep the offender out of prison, the alternative period of imprisonment is primarily a method of compulsion and thus only has to be sufficient to make non-payment problematic. If however, the fine is imposed to give a culprit a chance to keep out of prison even though imprisonment is warranted, the alternative imprisonment becomes primarily a means of punishment and the term of such imprisonment must be determined as if it were the only punishment imposed.

[10] In the current matters none of the accused was in a position to pay the fine imposed of R 2000 each, it was conveyed to the learned magistrate at the time when he considered sentence. It is trite law that even if the accused will in all probability not be able to pay the fine, it ought to be imposed as alternative to imprisonment if it would otherwise have been justified(*S v Seola* 1996(2) SACR 616(0)) .

- [11] The argument that there should be no proportion between the extent of the fine and the length of the period of imprisonment cannot be supported. The court believes this would lead to situations where injustices could occur on a regular basis. Take the following example to illustrate the point: The accused who cannot pay a fine for theft of a bar of soap, is sentenced in terms of Section 112(1)(a) Act 51 of 1977 to a fine of R 2000 or default of payment three years imprisonment. Surely the three years imprisonment is clearly excessive and disproportionate to the fine and an injustice will occur.
- [12] In cases where a fine is a suitable sentence even if the accused will probably not be able to pay it, as in the current matters, the presiding judicial officer must carefully consider the alternative period of imprisonment to ensure that should it be served, it will not lead to undue hardship and is not disproportionate to the fine. This is even more imperative in the current matters, where Section 112(1) (a) Act 51 of 1977 was applied, the presiding judicial officer clearly did not regard the offence as a serious one and in fact found that the offence did not merit a fine of more than R 5000. Surely he must have in mind a period of alternative imprisonment to go along with the fine of not more than R 5000. Without generalising, experience has however taught through the years that many magistrates more often than not impose three months imprisonment as the alternative to a fine of R 5000 when dealing with a matter in terms of Section 112(1) (a) Act 51 of 1977. Of course facts of cases may differ and the presiding judicial officer still has a discretion, but it is important to note that through the years there was a consistent proportionality kept between the extent of the fine and the length of the alternative period of imprisonment, especially in dealing with matters in terms of Section 112(1) (a). This in the end was done to promote fairness and to ensure that justice was in fact done in less serious matters.
- [13] Bearing the above mentioned in mind, the court finds that in the current five matters the period of alternative imprisonment of six months was excessive and disproportionate to the fine imposed, bearing in mind also the guideline referred to earlier provided by the Adjustment of Fines Act 101 of 1991.
- [14] The following order is made:
- 14.1. The convictions in all five matters are confirmed
- 14.2. The sentences in all five matters are set aside and replaced with the following sentence:
- A fine of R 2000 or three months imprisonment.

A C BEKKER

ACTING JUDGE OF THE HIGH COURT

I agree:

R G TOLMAY

JUDGE OF THE HIGH COURT

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