

A484/17
27/09/2017



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

HIGH COURT REF NO: 266/2017

CASE NO: 01/289/2017

MAGISTERIAL SERIAL NO: 10/2017

- REPORTABLE: NO
- OF INTEREST TO OTHER JUDGES: NO
- REVISED

2017-09-19
DATE


SIGNATURE

In the matter between:

THE STATE

and

THABANG TSHOTETSI

REVIEW JUDGMENT

VUMA AJ

- [1] This is an automatic review in terms of the section 302(3)(a) of the Criminal Procedure Act 51 of 1977, as amended.
- [2] On 14 August 2017 the accused was convicted in the North West Regional Court, sitting in Orkney, on one count of contravening section 49(1)(a) of the Immigration Act no. 13 of 2002 (the Immigration Act) having entered and being illegally in the Republic of South Africa. The conviction followed after a plea of guilty in terms of section 112(1)(b) of the Criminal Procedure Act 51/1977.
- [3] The accused was not legally represented and pleaded guilty to the charge mentioned above.
- [4] In considering sentence, the magistrate noted the following mitigating factors in favour of the accused, namely that:
- 4.1 He pleaded guilty;
 - 4.2 He showed "deep" remorse;
 - 4.3 He is a first offender; and
 - 4.4 He has a wife and a child who reside in South Africa.

[5] The accused was sentenced to (twelve) 12 months direct imprisonment.

[6] The facts of the case are the following:

On or about 10 August 2017 the accused entered the Republic of South Africa illegally in contravention of section 49(1)(a) of the Immigration Act. He was arrested and appeared on court on a charge as described in paragraph 2 *supra*. He pleaded guilty and was accordingly convicted.

[7] I am satisfied that the accused was correctly convicted and that the conviction is in accordance with justice.

[8] Prior to the 2011 amendment of the Immigration Act, punishment for contravention of section 49(1)(a) attracted suspended sentences. A case in point is *S v Sithole and Another (SH093/2013) [2014] ZAFSHC 18 (27 February 2014)*, where both accused were convicted in the regional court of contravening Section 49(1)(a) of the Immigration Act, they were each sentenced to three (3) months imprisonment, which was wholly suspended for five (5) years.

[9] The 2011 amendment to the Act resulted in the increased jurisdiction on punishment from a maximum of three (3) months to a maximum of two (2) years imprisonment. This is an indication that the law regarded the contravention on a serious light.

[10] However, it is my view that taking into account the factors in this matter and the sentence which the court imposed in *S v Sithole supra*, I am persuaded that the trial court *in casu* misdirected itself in not properly weighing the accused's personal circumstances against the seriousness of the offence. The fact that the accused is

a first offender and that he pleaded guilty should have weighed in his favour.

[11] I conclude that in the light of the circumstances of this case, the sentence imposed by the magistrate stands to be set aside and to be replaced with a wholly suspended sentence.

[12] In the result I make the following order:

ORDER:

1. *The sentence imposed by the Orkney Regional Court is set aside and replaced with the following:*

"The accused is sentenced to one (1) year imprisonment wholly suspended for a period of five (5) years on condition that he is not convicted of contravening section 49(1)(a) of Act 13 of 2002 committed during the period of suspension."

2. The judgment must be sent to the prison where the accused is held.
3. The accused is to be released immediately.
4. In terms of section 282 of the Criminal Procedure Act 51 of 1977, as amended, the sentence is antedated to the 14 August 2017.


LB VUMA

Acting Judge of the High Court
Gauteng Division, Pretoria

I agree.



SP MOTHLE

The Judge of the High Court
Gauteng Division, Pretoria