




A 427/17
24/08/2017

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DATE: 22 August 2017

DELETE WHICHEVER IS NOT APPLICABLE	
(1) RAPORTABLE: YES/NO	YES /NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	YES /NO
(3) REVISED	✓
22/8/2017	
DATE	SIGNATURE

Magistrate court for the district of Ekurhuleni East held at Springs

THE STATE vs JAIMA JOSEPH MASHABA

HIGH COURT REFERENCE NUMBER: 206/2017

MAGISTRATE CASE NUMBER: C457/2017

MAGISTRATE'S SERIAL NUMBER: 5/2017

THE STATE vs DIONISIO MOWAPLI

HIGH COURT REFERENCE NUMBER: 205/2017

MAGISTRATE CASE NUMBER: C332/2017

MAGISTRATE'S SERIAL NUMBER: 03/2017

THE STATE vs LUCKY DHLIWAYO

HIGH COURT REFERENCE NUMBER: 204/2017

MAGISTRATE CASE NUMBER: C505/2017

MAGISTRATE'S SERIAL NUMBER: 8/2017

REVIEW JUDGEMENT

JORDAAN J

These matters were sent on "special review" to the High Court a special reviews in that the provisions of section 112(1)(a) of Act 51 of 1977 had not been complied with.

I referred the matter to the Director of Public Prosecutions with the following remark:

"How do you suggest the sentences(s) should be altered?"

I have been supplied by an opinion of Adv DWM Broughton of that office with which Adv HE van Jaarsveld agrees.

This opinion reads as follows:

"1.

The accused in these matters were separately charged in the Springs magistrate's court ('the court *a quo*') with illegally entering and remaining in the Republic of South Africa in contravention of section 49(1)(a) of the Immigration Act 13 of 2002. The accused were legally represented in the court *a quo*. All three accused entered a plea of guilty to the charge, whereupon the State indicated that the respective pleas could be taken in terms of section 112(1)(a) of the Criminal Procedure Act 51 of 1977. The defence had no objection to this, and the accused were accordingly convicted on the basis of their pleas only. The accused were then each sentenced to three months' imprisonment. In the matter of Lucky Dhlwayo, the accused was also charged with possession of dagga in contravention of section 4(b) of the Drugs and Drug trafficking Act 140 of 1992. The accused pleaded guilty to this offence as well and the

provisions of section 112(1)(a) were also applied to such plea. The accused was sentenced to R3 000 or six months 'imprisonment on this charge which was wholly suspended for five years.

2.

The three cases have been sent on special review with a request that the sentences in relation to the offence in terms of the Immigration Act be set aside and replaced with an appropriate sentence, given that imprisonment could not be imposed as a sentence where the provisions of section 112(1)(a) of the Criminal Procedure Act were invoked. The Honourable Reviewing Judge has now requested this office to suggest how the sentences should be altered.

3.

In terms of section 112(1)(a) of the Criminal Procedure Act, a court may convict an accused on the basis of his or her plea only, where the court is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister of Justice, which is currently R5,000 in terms of Notice No R 62 published in Government Gazette No. 36111 of January 2013. A sentence of imprisonment without the option of a fine cannot be imposed where a court has followed the procedure as set out in section 112(1)(a) of the Act.

4.

In the present cases in the court *a quo* contemplated imposing a short term of imprisonment on each accused on the contravention of the

Immigration Act charge, with the understanding that the accused would be deported. The sentences in respect of such charge, where the accused were convicted merely on the basis of their bare pleas of guilty, were thus not competent.

5.

It is respectfully submitted that the remaining question is whether only the sentence must be interfered with on review, or whether the conviction also needs to be set aside given the irregularity vis-à-vis the section 112(1)(a) procedure. In S v Williams it was held that where a plea was taken in terms of section 112(1)(a) but the magistrate had considered that the offence was serious enough to warrant a sentence exceeding the maximum prescribed fine, not only was the sentence but also the conviction were not in accordance with justice and thus had to be set aside with an order that the matter was required to be remitted to the magistrate to act in terms of section 112(1)(b) of the Criminal Procedure Act.

6.

However, in the present cases, the accused have already served a portion of their terms of imprisonment and they are due to be deported, if the process of deportation has not commenced already. It would thus, with respect, serve no purpose at this stage to remit the matters to the court *a quo* to deal with the cases *de novo*. The accused were defended and clearly intended to plead guilty and the defence had no objection to the provisions of section 112(1)(a) being invoked. The offence was also of a minor nature. In the circumstances, it is respectfully submitted that

the convictions ought not to be set aside, but merely the sentences should be corrected on review with a sentence of a caution or reprimand. This would render the sentences in accordance with justice. As the accused have already served a period of imprisonment, it would, with respect, be futile to substitute a sentence of a fine for the sentence of imprisonment on review, in order to bring the sentences within the purview of section 112(1)(a).

7.

This submission was made notwithstanding the previous convictions against Lucky Dhliwayo of trespassing and contravening the Immigration Act, in respect of which the accused was fined. It could be argued that he prosecutor, given the previous convictions, ought not to have accepted a plea for the contravention of the Immigration Act charge in terms of section 112(1)(a). Nevertheless, it needs, with respect, to be underscored that this accused has now served a period of imprisonment and is due to be deported. Moreover, in the case of the latter accused, the sentence on the dagga charge falls within the ambit of section 112(1)(a) and ought to be confirmed."

I agree with the suggestions of The Director of Public Prosecutions.

The following order is made:

In respect of **JAIMA JOSEPH MASHABA** the conviction is confirmed. However the sentence is set aside and substituted with the following:

1. The accused is cautioned and discharged.

In respect of **DIONISIO MOWAPLI** the conviction is confirmed. However the sentence is set aside and substituted with the following:

1. The accused is cautioned and discharged.

In respect of **LUCKY DHLIWAYO** the conviction is confirmed on both counts as well as the sentence on count 1. In respect of count 2 the sentence is set aside and substituted with the following:

1. The accused is cautioned and discharged.



E Jordaan

Judge of the High Court

I agree,



SP Mothle

Judge of the High Court