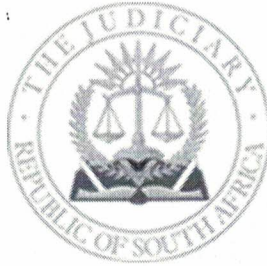


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 70/2351/18
MAGISTRATE'S SERIAL NO: 46/2018
SUPREME COURT REF NO: 115/19

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES / NO

[9 DECEMBER 2019]


SIGNATURE

In the matter between:

THE STATE

and

NDLOVU, MUZIKAYISE

RESPONDENT

REVIEW J U D G M E N T

MUDAU, J:

- [1] The matter has been placed before me for special review in terms of section 304 (4) of the Criminal Procedure Act, 51 of 1977 (the CPA), at the instance of the trial magistrate, Lenasia. Section 304(4) of the CPA provides as follows:
- “If in any criminal case in which a magistrate’s court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that

the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.”

- [2] The relevant background facts are as follows. On 18 October 2018 the accused appeared before the magistrate on two counts namely theft as well as a contravention of section 49 (1) of the Immigration Act No 13 of 2002 (by entering and remaining in the Republic). In count 1, it was alleged that the accused on or about 30 August 2018 at or near Lenasia unlawfully and intentionally stole 10 temporary permits from the position of one Lehasa Moloi, of the department of Road Traffic Management Corporation.
- [3] The accused who was legally represented, pleaded guilty to count 1. A statement in terms of section 112 (2) of the CPA in support of the plea of guilty was tendered. The matter was then postponed on a number of occasions until 29 October 2018 when the state added the second charge pursuant to the provisions of section 81(1) of the CPA. In terms of this section, it is permissible to join other charges against an accused before any evidence is led. On 16 November 2018 the accused pleaded guilty to count 2 supported by a statement in terms of section 112 (2) of the CPA. The accused was subsequently convicted as charged in respect of both counts. That was after the state had indicated their acceptance of the facts upon which the accused had pleaded. The complainant in respect of count 1 testified in aggravation of sentence. However, the evidence was not mechanically recorded on account of power interruptions.
- [4] The state also introduced in aggravation of sentence, a sworn statement by Chupye Christopher Matlou, in relation to the temporary permits, an investigator at the Road Traffic Management Corporation as intended by virtue of section 212 further read with section 213 (2) (a) of the CPA. After considering the mitigating and aggravating factors the accused was sentenced to an effective 12 months direct imprisonment without an option of a fine. In addition, the accused was declared unfit to possess a firearm in terms of section 103 (2) of the Firearms Control Act No 60 of 2000. As indicated above, both counts were taken together for purposes of sentencing.

- [5] The matter was referred to this court on special review in two respects. First, that the learned magistrate erroneously convicted and sentenced the accused for the contravention of section 49 (1) read with section 1, 9 (4), 32 and 34 of the Immigration Act No 13 of 2002. Secondly, that the learned magistrate erred when both counts were taken as one for purposes of sentence whereas count one is a common law offence and count 2 is a statutory offence. I directed the Director of Public Prosecutions (the DPP), Johannesburg, to submit his comments in this regard. This was complied with. I am hugely indebted to the DPP for such comments which I found useful in preparation of the judgment. As it turned out, the accused was on 19 February 2019 deported to his home country, Zimbabwe, purportedly in terms of section 34 (6) of the Immigration Act. Section 34 (6) of the Immigration Act provides that any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his or her sentence.
- [6] Section 304 (4) of the CPA is generally invoked by a magistrate when the correctness of a conviction or sentence is in doubt but the magistrate is *functus officio* in regard to its correction¹. The powers of this court on review are those referred to in section 304 (2) (c) (i-vi) of the CPA subject to the provisions of section 312 thereof with regard to the remittal of the case to the court *a quo*. Significantly, this court has inherent power of review as extended by section 173 of the Constitution. The powers to intervene on review exist in circumstances where the proceedings are not in accordance with justice.
- [7] In this case, the magistrate had convicted the accused in respect of count 2 of a contravention of section 49 (1) of the Immigration Act as opposed to section 49 (1) (a) of the same Act. Section 49 (1) (a) of the Immigration Act as amended provides that: 'Anyone who enters or remains in the Republic in contravention of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years'. Section 49 (1) (b) of the same Act reads as follows : ' any illegal foreigner who fails to depart when so ordered by the Department, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding four years'.

¹ S v Khubekha 1999 (1) SACR 65 (W).

- [8] It is apparent that, the prosecutor had used a pro forma charge sheet in formulating the charge in respect of count two. It is however clear from a proper reading of the accused section 112 (2) statement that he admitted to “entering the Republic of South Africa without the necessary papers, document and or passport” in contravention of section 49 (1) (a) of the Immigration Act. By his own admission the accused was aware that it was an offence to do so. In addition, he had the necessary intention to do so. It is therefore clear that the accused knew the offence he committed. In my view the omission by the prosecutor to add (a) in charging the accused of contravening section 49 (1) of the Immigration Act is not under the circumstances fatal. There is no failure of justice.
- [9] It remains to deal with the question of the taking of a common law offence and a statutory offence together for purposes of sentence. It is not unusual that various and separate counts in the same matter are taken together for purposes of sentence. The CPA does not authorise such action. Neither is such action prohibited by the CPA. In *S v Kruger*², the SCA cautioned that this is to be done in exceptional cases only, since it is desirable that each separate crime should be punished separately, and secondly, because a global sentence presents problems on appeal. It is trite that when counts are closely connected in time, place and circumstance they may be taken together for purposes of sentence and treated as one³.
- [10] Where charges are taken together for purposes of sentence it is impermissible for the court to impose a sentence which is competent for one charge and incompetent for the other. It is further trite that where a statutory offense carries a fine not exceeding a stated maximum fine or imprisonment for a period not exceeding a stated maximum period, the court has a discretion to impose either the fine or imprisonment⁴. In this case the trial court exercised its discretion and imposed imprisonment without an option of a fine. The effective sentence is competent for both counts 1 and 2 in this matter. It accordingly follows that there is no need to interfere with the convictions or the sentence imposed by the magistrate. However, the conviction on count two is

² 2012 (1) SACR 369 (A) at para 10

³ *S v Immelman* 1978 (3) SA 726 (A) 728E- 729A.

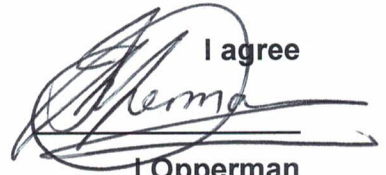
⁴ *S v Arends* 1988 (4) SA 792 (E).

corrected in terms of section 304 (2) (c) (iii) of the CPA to read 'a
contravention of section 49 (1) (a) of the Immigration Act No 13 of 2002.



T P MUDAU

**[Judge of the High Court,
Gauteng Local Division,
Johannesburg]**



I agree

I Opperman

**[Judge of the High Court,
Gauteng Local Division,
Johannesburg]**