



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

24/05/2016

CASE NO: A 335/16

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
19/05/2016	
DATE	SIGNATURE

High Court ref. no. 76/2016

Magistrate case no: D05/16

In the matter between:

THE STATE

and

TAEMBEDZWA MADOCHA

REVIEW JUDGMENT

MAKGOKA, J:

[1] This matter was laid before this court on special review at the instance of the acting head of court, Daveyton. The accused pleaded guilty to, and was convicted of, being an illegal foreigner in the Republic. He was charged under the provisions of section 45 (1)(a) read with section 1, 10, 25, 25, 26, 27 and 49 of the Immigration Act number 13 of 2002, as amended by the Immigration Amended Act 19 of 2004 further read with s1 (1)(a) of the Adjustment of Fines Act 101 of 1991. He was sentenced to six months direct imprisonment.

[2] The acting head of court, Daveyton queries the sentence on the basis that it exceeds the sentence prescribed by s 45(1)(a) of the Immigration Act 19 of 2004, which, according to him, provides for a fine or imprisonment not exceeding three months, upon conviction. Two aspects arise from the query by the Head of Court, which seem to have eluded him. First, the accused was incorrectly charged and convicted of contravening s 45(1)(a). That section does not create an offence. Section 49(1)(a) does. The charge as framed is in line with the provisions of s 49(1)(a) which provides that anyone who enters or remains in, or departs from, the Republic in contravention of the Act, shall be guilty of an offence.

[3] The second aspect which the acting head of court seems not to be aware of, is the maximum period of imprisonment for contravention of s 49(1)(a). Initially, that period was three months' imprisonment. That period was replaced with a maximum of two years' imprisonment by s 24 of the Immigration Amendment Act 13 of 2011, which commenced on 26 May 2014. In principle therefore, the acting magistrate who imposed the sentence of six months' imprisonment was entitled to impose such a sentence. The sentence was therefore a competent one. It is very peculiar that the fact that the accused was charged under a wrong section, or that the charge sheet incorrectly referred to a wrong penalty provision, seem to have eluded all – the acting magistrate, the prosecutor, the defence, and the acting head of court.

[4] In their helpful comments, Adv. GJC *Maritz* and HM *Meintjies* SC of the office of the Director of Public Prosecutions, point out, however, that due to the fact that the accused was not properly appraised of the correct legal position at any stage of the proceedings, he may have been influenced to plead guilty given the maximum term of 3 months' imprisonment. For this reason, the Deputy Director of Public Prosecutions is of the view that the issue of prejudice arises, and suggests that the sentence be interfered with and reduced to three months' imprisonment. I agree. In light of these, it is necessary to amend the charge sheet in terms of s 304 (2)(c)(iv) of the Criminal Procedure Act 51 of 1977. The only possible prejudice to the accused is tempered by the order we intend to make in reducing the sentence to 3 months' imprisonment.

[5] In the result the following order is made:

1. The charge sheet is amended to read as follows:

'That the accused, is guilty of contravening Section 49(1)(a) read with sections 1,10, 25, 26, 27 and 49 of the Immigration Act no 13 of 2002, as amended by Immigration Amendment Act 19 of 2004 further read with S1 (1)(a) of the Adjustment of Fines Act 101 of 1991.

In that upon or about 01 January 2016 and at or near Daveyton in the district of Ekurhuleni South East, the accused entered or remained in the Republic of South Africa without possessing the required or valid documents to do, thereby committing an offence.'


2. The sentence imposed by the magistrate Court is set aside and in its stead the following is substituted:

'The accused is sentenced to 3 months' imprisonment.'



T.M. MAKGOKA
JUDGE OF THE HIGH COURT

I agree



S.S. MPHAHLELE
JUDGE OF THE HIGH COURT