



**IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]**

High Court Ref. No.:081880
Case No.: A291/08
Serial No.: 68/08

In the matter between:

- REPORTABLE -

THE STATE

and

ROBERT ONGOM

REVIEW JUDGMENT DELIVERED ON 27 NOVEMBER 2008

LE GRANGE, J:

[1] This matter came before me by way of automatic review.

[2] The accused appeared in the Magistrates Court, Malmesbury, and was charged with contravening section 49(14) read with Section 1 of the Immigration Act, 13 of 2002.

[3] The accused enjoyed legal representation, and pleaded guilty. The accused' legal representative, in terms of the provisions of Section 112 (2) of Act 51 of 1977 handed a written statement which contain certain admissions, to the Court. The matter was then postponed for sentence and at the next appearance the accused

terminated the mandate of his attorney. He then decided to conduct his own defence and was sentenced to a term of 18 (eighteen) months direct imprisonment.

[4] I had serious doubt whether the accused admitted all the elements of the crime convicted of and raised my concerns with the Magistrate. I also deemed it appropriate to request the opinion of the Director of Public Prosecution, Western Cape, in this regard. I wish to thank the office of the Director of Public Prosecution, in particular Adv CJ Theunissen, for the comprehensive memorandum she compiled on such short notice.

[5] The provisions of section 49(14) provide as follows: *"Any person who for the purpose of entering or remaining in, or departing from, or of facilitating or assisting the entrance into, residence in or departure from, the Republic, whether in contravention of this Act or not, commits any fraudulent act or makes any false representation by conduct, statement or otherwise, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding four years."*

[6] The sum total of facts, upon which the Magistrate relied to convict the accused, is recorded as follows in the written statement:

"I went to the bank to cash a traveller's cheque. The officials realized that there was fault with the cheque, the police was called and I was arrested. I informed the police that I was not person who I declared I was and that the documentation i.e. the identity document have I had in my possession to use in order to cash the cheque was false and that I was not Enock Marelevu and that I am not a Malawian national. I admit the following: That I know that my actions were wrong and punishable in a court of law that I had the intention to make a false representation by pretending to be somebody that was not to remain in the country that I had no right to consent to my action".

[7] The Magistrate, in his reply stated the following:-

"I am of the opinion that although the accused through his lawyer admits in paragraph 3 of his statement i.t.o Sec 112 (2) of Act 51/1977, that he committed the fraudulent act, it does not cover in detail how the fraudulent act to enter or remain in the republic was committed.

I will respectfully abide by your decision."

[8] In my view, the facts the accused purports to admit in his written statement, do not pertain to the charge of committing a fraudulent act to enter, remain or depart, or to facilitate such conduct to enter, remain or depart from the Republic. It is obvious that the admissions of the accused rather relates to an attempt to fraudulently cash a cheque with a false identity document. It follows that all elements of the crime, in terms of the charge to which the accused pleaded guilty to, have not been admitted. The magistrate, in my view, should have considered applying the provisions of section 113 of the Criminal procedure Act, 51 of 1977. The conviction and sentence is not in accordance with justice and needs to be set aside. This is also the view expressed in the memorandum of the Director of Public Prosecutions.

[9] Before making the necessary order, I wish to make the following remarks regarding the written statement drafted by the attorney on behalf of the accused. Firstly, the statement was not signed by the accused. Secondly, certain words were deleted. Thirdly, certain paragraphs were altered and the handwriting became difficult to read. The deletions and alterations done were also not initialled by the accused. I find it surprising that the Magistrate, who is an experienced judicial officer, allowed the attorney the latitude to hand in such a document in a Court of Law. The statement manifests a job done in haste, with no attention to detail.

[10] I fully appreciate the enormous challenges Judicial Officers in Lower Courts face on a daily basis but this type of laxity by legal practitioners, borders on contempt for the judicial process. Judicial Officers should refuse to accept such poor drafting of documents as it leads to a general disintegration of proper practice in the Lower Courts that impacts negatively on the administration of justice and should not be condoned.

[11] Returning to the order, I have given due consideration to the possibility of remitting the matter to the Magistrate in order to deal with it in accordance with the law. The accused is however a 37 year old first offender and a university graduate who has been displaced in his country of origin due to continuous arm conflict. He has already served a period of imprisonment. I am of the view that it will not be in the interest of justice, in this instance, having regard to the facts of this matter, to remit it to the Presiding Magistrate. A different approach by the relevant Authorities may perhaps be appropriate in these circumstances.

[12] In the result, the following order is made:-

The conviction and sentence is set aside. The record is herewith returned to the Magistrate's Office.

LE GRANGE, J

I agree. It is so ordered.

NC ERASMUS, J