REPUBLIC OF SOUTH AFRICA

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

CASE NO: A105/2016

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

23/1/2017
DATE

SIGNATURE

In the matter between:

SAUDIEN SIMONE Appellant

and

THE STATE Respondent

SUMMARY

Criminal Procedure – irregularities and misdirections – criminal appeal – magistrate committing irregularities in respect of application of provisions of section 112 of the Criminal Procedure Act 51 of 1977 during course of trial – irregularities and misdirections infringing appellant's right to fair trial guaranteed in section 35(3) of Constitution – vitiating entire proceedings – conviction and sentence set aside on appeal.

JUDGMENT

MOSHIDI, J:

INTRODUCTION

[1] Ms Simone Saudien ("*the appellant*") stood trial in the Johannesburg Magistrate's Court ("*the court a quo*") on two counts. The first count was that of malicious damage to property. In this regard, it was alleged that the accused unlawfully and intentionally broke or damaged two windows and one door, the property of the Booysens police station, at the Booysens police station, and on 25 March 2015, ("*count 1*"). The second charge was one of assault. In this regard, the state alleged that the accused unlawfully and intentionally assaulted Constable Daniel Maluleke ("*Maluleke*") by pushing him and hitting him with a cellphone (emphasis added), at the same time and place as mentioned in respect of count 1, ("*count 2*").

[2] The appellant was legally represented throughout the trial. The agreed and reconstructed record of the proceedings shows that: the appellant pleaded guilty to count 1 on 6 May 2015, which guilty plea was contained in a statement, exhibit "A", in terms of the provisions of section 112(2) of the Criminal Procedure Act 51 of 1977 ("*the Criminal Code*"). Thereafter, the trial was postponed for evidence in respect of count 2.

[3] At the conclusion of the trial, the appellant was convicted of both counts as charged. In respect of count 1, the appellant was sentenced to 12 (twelve) months' imprisonment, and in respect of count 2, she was sentenced to 6 (six) months' imprisonment. The court *a quo* ordered that the sentences be served concurrently. The effective sentence was therefore 12 (twelve) months' imprisonment.

[4] The present appeal, with leave granted by the court *a quo*, is directed against both the conviction and sentence imposed.

THE GROUNDS OF APPEAL

[5] The grounds of appeal at the initial application for leave to appeal before the court *a quo*, came to the following: the plea of guilty in respect of count 1, ought not to have been accepted by the court *a quo*, but instead, a plea of not guilty in terms of the provisions of section 113 of the Criminal Code, entered. In this regard, it was contended that when the appellant was taken to the Booysens police station by the two police witnesses on the day of the offences, and following a complaint of domestic violence against her, she had smoked a zol of dagga earlier that morning. In other words, so the argument proceeded, she was not in full control of her senses at the police station when she did what the state alleged. The second ground of appeal was that, when at the police station on the day of the offences, she was not under arrest and no restrictions could be placed on her movements, and her arrest under the circumstances described by the evidence, was unlawful. In

regard to sentence, it was argued that, despite the state prosecutor's closing submission that direct imprisonment was not warranted, the court *a quo* nevertheless proceeded to do so. The original grounds of appeal were expanded and motivated in the subsequent formal application for leave to appeal, as well as in the current heads of appeal.

[6] I have had a careful study of the entire record of proceedings and documentation filed in this matter. In the light of the conclusion which I have come to, it is truly unnecessary to pronounce at all on the sentences imposed, save as in the order I make below. There is, however, much to be said about the evidence of the state witnesses, and the whole conduct of the trial on the merits. Thankfully, the documentation show that the appellant was released on bail during November 2015, or at least, bail was fixed in the amount of R5 000,00, at that stage.

THE APPELLANT'S RIGHT TO A FAIR TRIAL

[7] The starting point on the merits is the question of the appellant's right to a fair trial, both in terms of the common law and second 35(3) of the Constitution. Much has been written and reported in case law ever since. For example, as far back as 1995 (under the Interim Constitution), the Court in *S v Zuma and Others* 1995 (2) SA 642 (CC), in reference to unlawfully admitted evidence in a trial, "*since that date s 25(3) of the Interim Constitution, has required criminal trials to be conducted in accordance with those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials and*

criminal appeals to give content to those notions". This test and approach has stood the test of times up to date. Regrettably, this approach was not followed in the present appeal, for numerous reasons as demonstrated immediately below.

THE EVIDENCE

[8] The evidence show indisputably, that: the police received a domestic violence complaint that day; they proceeded to the appellant's residence; they collected the appellant and took her to the police station; she was not placed under arrest until much later; no constitutional rights were ever explained or read to her at that stage; the appellant was unstable, angry, agitated, resistant, and possibly still under the influence of dagga; she tried to free herself by leaving the detective's office where she was kept, and to contact her family and fiancé, the complainant in the domestic violence allegation; she was restrained and brought back to the office; the evidence of the police witnesses as to exactly what transpired at the police station was contradictory, to say the least; in particular, the evidence as to how exactly the complainant in the assault allegation was assaulted was not supported by his evidence; the amendment sought at the end of the evidence to support the assault charges was not justified at all; the acceptance of the plea of guilty by the court *a quo* on its reconstructed transcript of the record, was problematic; in spite of such plea and the fact that the appellant was legally represented, the court *a quo*, strangely never bothered to make further and necessary enquiries, as she was obliged to do; pursuant to the tendered plea of guilty in

respect of count 1, which was confirmed by the appellant, the appellant's attorney of record read the written statement into the record. In respect of count 2, the appellant pleaded not guilty, and her plea explanation, in terms of the provisions of section 115(1) of the Criminal Code amounted to a bare denial. Immediately thereafter, the matter was postponed instantly to 25 May 2015. In so doing, and strangely, the record states:

> "*Op hierdie stadium is die saak dan uitgestel vir skuldigpleit. As daar dan nou 'n tweede klagte waarvan nie bewus was nie en ons moet verder onder verhoor gaan op daardie klagte, 25/5/?*" (emphasis added)

[9] From the above, it is plain that the court *a quo* gave no consideration at all whether she was satisfied that the appellant had admitted all the essential elements of the offence (count 1), and had indeed intended to plead guilty to the charge. In addition, the prosecutor was not asked whether the state accepted the facts as contained in the guilty plea under section 112(2) of the Criminal Code. There was also no immediate pronouncement in respect of count 1. To make matters worse, in the judgment upon the conclusion of the trial, the learned magistrate referred to the section 112(2) guilty plea statement as a "*plea explanation*". This was plainly incorrect and a misdirection.

THE PROVISIONS OF SECTION 112 OF THE CRIMINAL PROCEDURE ACT

[10] For the sake of clarity and repetition, section 112(1) of the Criminal Code provides that:

> *"When an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea ... The presiding judge, regional magistrate or magistrate may, ... convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and ..."*

Subsection 112(1)(b) provides that:

> *"The presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine ..., or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence."* (underlining added)

THE IRREGULARITIES AND MISDIRECTIONS

[11] From the above, it is plain once more to me that there was no substantial compliance with the jurisdictional requirements of the provisions of section 112 of the Criminal Code. This was so despite reported numerous case law dealing with the application of the said provision. To make matters

worse, and as argued by the appellant, and quite correctly too in my view, the learned magistrate committed a misdirection since a plea explanation is in terms of section 115 of the Criminal Code under circumstances when an accused person pleads not guilty.

[12] The record is replete with other irregularities and misdirections which require no extensive elaboration. Briefly stated; the criticism levelled by the magistrate against the appellant's attorney of record was not entirely justified; the taking over of the questioning of the state witnesses in evidence-in-chief; the questioning of the appellant by the magistrate which clearly came through as cross-examination, and not clarification of issues; the belief of the magistrate that the appellant was under lawful arrest when she was merely a potential respondent in a domestic violence complaint was incorrect; the descending onto the arena by the magistrate was unwarranted; and the language of the magistrate used towards the appellant's legal representative on the occasion when she said to him: "*That is absolute nonsense Sir. I do not know where you got that* [indistinct] ...", was uncalled for. This is on page 59 line 17 of the record. This is clearly injudicious language. The above list of misdirections is not exhaustive, regrettably. The appellant was also addressed by the magistrate on numerous occasions as "*die beskuldigde*".

CONCLUSION

[13] The conclusion which I reach is that, the extent of the irregularities and misdirections in this trial is so grave that it strikes to threads the state's entire

case against the appellant. In *S v Mosoinyane* 1998 (1) SACR 583 (T) the appeal court, in the process of interfering and setting aside a magistrate's decision to convict the appellant, held, *inter alia*:

> "*It was important to draw a distinction between questioning by the Court, and cross-examination; if the Court indulged in cross-examination, it would certainly sacrifice its image of impartiality. The Court's power to question the accused and his witnesses was accordingly restricted to elucidating or clarifying the evidence presented. Further that, the magistrate in casu had taken the questioning of the State witness out of the hands of the prosecutor, and had thereby elicited considerable evidence which weighed against the accused. Further that the aforesaid conduct of the magistrate was inconsistent with the principles expressed above, and amounted to irregularities, which per se probably created sufficient grounds for interfering with the conviction.*" (See headnote.)

I am of the view that the irregularities are against the principles set out in *S v Zuma supra*. More recently, the Supreme Court of Appeal, in *S v Chauke* 2016 (1) SACR 408 (SCA), considered the effect which an irregularity had on the appellant's right to a fair trial. At paragraph [18] of the judgment, the Court (per Theron JA) said:

> "*The constitutionally enshrined right to a fair trial, as captured in s 35(3) of the Constitution, embraces a broad 'concept of substantive fairness'. It is a comprehensive and integrated right, the content of which is to 'be established on a case by case basis'. In my view the irregularity is fundamental. The proper administration of justice and the dictates of public policy require that it be regarded as fatal to the proceedings in the trial court ...*" (footnotes omitted.)

APPLICATION OF THE LEGAL PRINCIPLES

[14] In applying the above principles to the facts of the present appeal, the conclusion that the appellant did not receive a fair trial due to the identified irregularities and misdirections, is irresistible. These have the effect of vitiating the entire trial, including count 2. In any event, the latter count appears to have been a duplication of charges. The result is that the convictions and sentenced call to be set aside *in toto*.

ORDER

[15] The following order is made:

The appeal succeeds and the convictions and sentences imposed by the magistrate are hereby set aside.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur:

G B ROME
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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