A716/2014

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA)

29/09/2014

Date: ~~11 August 2014~~

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

22/9/2014 Pretoria
DATE SIGNATURE

Magistrate

Phalaborwa

Case number: 390/2012

High Court reference number: 410/2014

THE STATE VERSUS PIET JOHANNES VAN DER MERWE

REVIEW JUDGEMENT

Pretorius J

[1] This matter was sent on review on 6 May 2014, although the accused had been convicted and sentenced on 27 September 2012. The judicial head

at Phalaborwa Magistrate Court informed me that she had found this matter whilst conducting an inspection. According to her the presiding magistrate was an acting magistrate who is no longer in the service of the Department of Justice and Correctional Services.

[2] Originally the judge dealing with the review addressed certain queries regarding sentence to the magistrate. The judicial head at Phalaborwa Magistrate Court responded and the Director of Public Prosecutions was requested to comment.

[3] Ms Harmzen on behalf of the Director of Public Prosecutions commented that the sentence was in order, but that the plea proceedings amount to gross irregularity which entails that the proceedings should be set aside and the case should be referred back to the court a quo for proper plea proceedings in terms of section 112(1)(b) and/or section 113 of Act 51 of 1977.

[4] It is clear from the plea proceedings that the magistrate, who had presided at the hearing, when questioning the accused in terms of section 112(1)(b) of Act 51 of 1977 asked leading questions. The purpose of questioning an accused in terms of section 112(1)(b) is to protect an undefended accused from the consequences of an ill-considered plea of guilty. The magistrate asked four leading questions to the accused, after he had pleaded guilty.

The court did not adhere to the principles as set out in **S v Seabi and another 2003 (1) SACR 620 (T)**:

> *"Although s 112(1) of Act 51 of 1977 does not specifically require that an accused who pleads guilty be asked if he pleads guilty freely, voluntarily and without any undue influence,* ***I am of the view that it is both desirable and in keeping with the constitutional ideals of ensuring a fair trial for every accused, particularly unrepresented accused, that they be asked if their pleas are free, voluntary and without any undue influence.*** *This is particularly important where the court has to deal with uneducated, illiterate and unsophiscated accused. A failure to do so may result in a travesty of justice where an accused may be convicted and sentenced on 'a forced plea of guilty'."* (Court's emphasis)

[5] The court *a quo* did not enquire whether the plea is free, voluntary and without undue influence. It is clear from the record of proceedings that the magistrate indicated to the accused that he must answer the magistrate's questions in the affirmative as he had pleaded guilty. A further irregularity is that a enquiry was held to ascertain whether the accused should posses a valid driver's license, but the magistrate only dealt with it in the judgment without holding an enquiry.

[6] In **S v Aucamp and 6 similar cases 2002 (1) SACR 524 EC** it was held at 529 d-e by Jennett J:

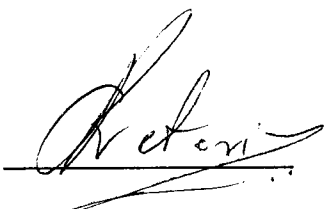
> *"As appears from the aforegoing, in the type of case to which s112(1)(b) refers, namely cases other than minor offences and in which more severe punishments may be imposed, the Legislature seeks to protect accused persons from conviction simply by virtue of their pleas of guilty, which experience has shown may for various reasons be erroneous. The presiding judicial officer, whether a Judge, regional magistrate, or magistrate, may only convict an accused person of an offence in respect of which he or she has pleaded guilty if the judicial officer is satisfied that such accused is so guilty and this the judicial officer must establish either by questioning the accused with reference to the alleged facts of the case to ascertain whether the accused admits the allegations in the charge to which he has pleaded guilty or from the written statement by the accused or his legal adviser thereanent, supplemented by any questions to the accused by the judicial officer concerned in clarification thereof "*

[7] There is no question that the trial was not held according to justice and the conviction and sentence should be set aside. The court a *quo* has to comply with the provisions of section 112(1)(b) of Act 51 of 1977, even if the matter was originally heard more than two years ago. If the acting magistrate who had presided at the initial hearing is no longer available

the matter must be heard *de novo* should the Director of Public Prosecutions decide to do so.

[8] The following order is made:

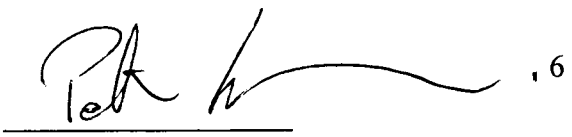
1. The conviction of driving under the influence of liquor in terms of section 65 (1) (a) / (b) of the National Road Traffic Act 93 of 1996; of 27 September 2012 is set aside;
2. The sentence imposed on 27 September 2012 is set aside;
3. The matter is remitted to the court *a quo* to comply with the provisions of section 112 (1) (b) and/or section 113 of the Criminal Procedure Act 57 of 1977.
4. If it is not possible to comply with order 3, the Director of Public Prosecutions can set down the matter to be heard *de novo*.



C. Pretorius

Judge of the High Court

I agree,



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P. Lazarus

Acting Judge of the High Court