REPUBLIC OF SOUTH AFRICA

A435/16

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

30/6/2016

CASE NUMBER:186/2015

In the matter between:

NKADIMENG RONNY

and

STATE

J U D G M E N T

KUBUSHI, J

[1] The accused, Ronny Nkadimeng, was charged in the magistrates' court Cullinan on two counts, namely, one count of robbery and one count of malicious injury to property.

[2] On the robbery charge it was alleged that on 24 January 2016 and at or near Rumo Drive, Ext 5, Refilwe in the District of Tshwane East, the accused unlawfully and intentionally assaulted Senior Hlatswayo and did then and with force take three (3) cellphones, her property or property in her lawful possession, from her.

[3] As regards the malicious injury to property charge, the allegation is that on 2 February 2016 at Rayton in the District of Tshwane East, the accused unlawfully and intentionally damaged the window and/or grill of a bakkie, the property or property in the lawful possession of the South African Police Service and/or J Leonard, by kicking or punching it.

[4] The accused pleaded guilty and the presiding magistrate proceeded to question him in terms of s 112 (1) *(b)* of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act"). The record shows the material questioning in terms of section 112 (1) *(b)* of the Act as the following:

> "Q: Were you on _____ Cullinan in the Tshwane District?
>
> A: Accused did not assault Senior Hlatswayo. He fell. People at the tavern were fighting, including Senior who fell. Accused understands that the cellphones did not belong to

> him. He took the phones in order to sell them. Accused understood that such action was unlawful. He was not forced to take the cellphone by anyone."

[5] Based on this questioning the presiding magistrate made the following findings:

> "Based on the testimony, it appears that accused is pleading guilty to the offence of theft."

[6] The state accepted the plea of theft and thereafter withdrew the charges of malicious injury to property against the accused. The presiding magistrate found the accused guilty of theft in terms of s 112 (1) *(b)* of the Criminal Procedure Act as pleaded and proceeded to sentence him. The accused was as a result sentenced to three (3) years direct imprisonment of which two (2) years was suspended for five (5) years on condition the accused is not convicted of theft or a similar offence during the period of suspension. He was also declared unfit to possess a firearm.

[7] After reading the record of proceedings, the acting judicial head Cullinan ("the acting judicial head") noticed that the accused was convicted in terms of s 112 (2) of the Criminal Procedure Act and thus referred the matter for review in terms of s 304 (4) read with s 304 (2) *(c)* of the Criminal Procedure Act, to this court. The matter is before me, in chambers, as a reviewing judge.

[8] The acting judicial head requests in a letter dated 16 May 2016 that I set aside the conviction and sentence in terms of s 304 (2) *(c)* (iii) of the Criminal Procedure Act and to remit the matter to the magistrate to note a plea of not guilty in terms of s 113 of the Criminal Procedure Act and continue with the trial in terms of s 304 (2) *(c)* (v) of the Criminal Procedure Act, on the following grounds:

> "(1) The accused was charged with robbery but convicted of theft. Nowhere in the record does it reflect that the state accepted the plea on a theft charge.
>
> (2) The questioning in terms of section 112 (1) *(b)* of the Criminal Procedure Act as *per* Annexure "A" is not in accordance with the law. Questioning remains primarily a safety measure against unjustified convictions and is applied and circumspection [sic!] (see S v Naidoo 1989 (2) SA 114 (A) at 121C). The accused in this matter did not even admit all the elements of the offence.
>
> (3) The conditions of sentence in this matter are also not in accordance with the law. Sentence conditions must be clear and enforceable in case of contravention in this instance, the presiding officer uses "similar offences" which is vague and ambiguous.
>
> (4) Section 103 Act 60/2000 is an inquiry which must form part of the record. The purpose thereof is to determine whether the accused should or should not be declared unfit to possess an arm. In the proceedings in this matter the accused was declared unfit to possess an arm without such an inquiry.
>
> (5) The record does not show any direction with regard to the revision of the sentence. The sentence in this matter warranted to be dealt with in terms of section 302 (2) *(b)* of the Criminal Procedure Act. The presiding magistrate did not deal with the matter in accordance with the above mentioned section as required by the law."

[9] The acting judicial head's letter was referred to the office of the Deputy Director of Public Prosecutions ("the DDPP") for comment. In the comment, the DDPP states that some of the grounds the acting judicial head raises, without specifically stating which ones, have merit and warrant a conclusion that the conviction and sentence are irregular and should be set aside and comments further as follows:

"3.

The original record of court proceedings shows that the accused was asked on 24 April 2016 [the correct date is 22 April 2016] by the presiding magistrate whether he understands the charges (of robbery and malicious injury to property) to which he replied in the affirmative. The presiding officer then recorded that he elects to plead guilty, ostensibly on both charges. The accused was then questioned by the presiding officer in terms of section 112 (1) *(b)* of the Criminal Procedure Act only in respect of count 1 namely robbery. The original record further shows that the prosecutor brought an application that the second count of malicious injury to property be withdrawn after he had accepted the accused's plea of guilty on a charge of theft with regard to the charge of robbery. The acting judicial head's remark in paragraph 4 (1) of his letter is therefore incomprehensible.

The same applies to his remark in paragraph 4 (5) of his letter. His reference to section 112 (2) of the Act in paragraph (2) of his letter is incorrect. The original record of court proceedings shows that the following was conveyed to the accused by the presiding officer: 'Rights in respect of application for leave to explain (sic!) in full." Accused understood this. (see page 1 of the record). According to the typed copy of the record the rights in respect of application for leave to appeal and Review were explained in full to the accused. Magistrate S Rama furthermore certified in his "Application for Special Review case" that the prisoner was on the said date informed

that the proceedings should be sent for review by the Gauteng Provincial Division of the Supreme Court of South Africa Pretoria within seven days. This document erroneously refers to a conviction of the accused on charges of (1) robbery and (2) malicious injury to property. The plea of the accused does not even appear on the typed copy of the J15. The sentence on count 1 in the typed copy of the J15 is three (3) years direct imprisonment of which two (2) years is suspended for five years (5) whereas the original J15 is three (3) years direct imprisonment of which two (2) years is suspended for five (5) years on condition accused does become convicted (sic!) of theft or a similar offence during period of suspension. . .

4.

I now return to the withdrawal of count 2 of the charge sheet after the accused (according to the record) pleaded guilty to the two charges. Section 6 *(a)* of the Criminal Procedure Act provides that a prosecutor may withdraw a charge only before an accused has pleaded to that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge."

[10] On the basis of the aforementioned submissions the DDPP is of the view that the conviction and sentence, in this instance, are not in accordance with justice and recommends that they be set aside and the matter be remitted to the trial magistrate as suggested by the acting judicial head and as stated in paragraph [8] of this judgment.

AD CONVICTIONS

[11] It is common cause that the accused was charged on two counts, namely, one count of robbery and one count of malicious injury to property. It is also not in dispute that the accused pleaded guilty. I am, however, not in agreement with the DDPP's submission's that the accused pleaded guilty to both charges.

[12] The original record shows that the 'accused pleaded guilty to the charges'. The record does not specifically state that he pleaded guilty to both charges. My understanding, on perusal of the record, is that the accused pleaded guilty to the charge of robbery only. This view is supported by the fact that the accused was questioned by the presiding magistrate only in respect of the robbery. This is also confirmed by the fact that immediately after the state had accepted the presiding magistrate's finding that the accused pleaded guilty to theft, the state withdrew the charges of malicious injury to property against the accused. I am as such satisfied that on count 2, that is, the charges of malicious injury to property were properly withdrawn.

[13] As regards count 1, the accused was charged of robbery but found guilty of theft. The acting judicial head makes a submission that the accused should not have been convicted as such because there is nowhere in the record where it is reflected that the state accepted the plea on a theft charge. This submission is wrong. Although this is not reflected in the typed record, but on a proper perusal of the original record it is clear that the state did accept the plea on the charge of theft. The

record shows that after questioning the accused in terms of s 112 (1) *(b)* of the Criminal Procedure Act, the presiding magistrate made a finding that '*Based on the testimony, it appears that Acc is pleading guilty to the offence of theft.*' The record also shows that the '*State accepts such plea. See annexure "A".*'

[14] The presiding magistrate was correct to have not convicted the accused on the robbery charges, but, I am not satisfied that the conviction of theft has been proved.

[15] Section 112 (1) *(b)* of the Criminal Procedure Act stipulates that –

> "(1) Where an accused person 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 the plea –
>
> *(a)* . . .
>
> *(b)* the presiding judge, regional magistrate or magistrate shall . . . 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. . . ."

[16] The primary purpose of s 112 (1) *(b)* of the Criminal Procedure Act in questioning the accused after she or he has pleaded guilty is for the trial court to ascertain whether the accused admits all the allegations in the charge she or he is

facing. A further purpose of such questioning is said to be to safeguard an accused against the result of an unjustified plea of guilty.[1]

[17] I am in agreement with the submission by the DDPP that the questioning as reflected in Annexure "A" is not adequate enough to comply with the requirements of s 112 (1) *(b)* of the Criminal Procedure Act. The questioning is too cryptic to determine if the accused is admitting all the elements of the offence he is convicted of. The conviction in terms of s 112 (1) *(b)* of the Criminal Procedure Act is, thus, irregular and cannot stand.

[18] Both the acting judicial head and the DDPP submit that the conviction ought to be set aside and the matter remitted to the presiding magistrate to note a plea of not guilty in terms of section 113 of the Criminal Procedure Act and to continue with the trial. I am, however, of the view that, in the interest of justice, the matter should be remitted to the magistrates' court for the accused to be tried *de novo* before a different magistrate.

AD SENTENCE

[19] The submission by the acting judicial head that the conditions of the sentence imposed, in this instance, are not in accordance with the law is correct. It is indeed so that the conditions attached to a sentence must be clear and enforceable and as

[1] See S v Naidoo 1989 (2) SA 114 (A) at 121C.

such the use of the words 'similar offences' in the conditions of the sentence are vague and ambiguous. On this basis alone the sentence ought to be set aside.

[20] It is also correct that the presiding magistrate should not have declared the accused unfit to possess a firearm in terms of s 103 of the Firearms Control Act 60 of 2000 without holding an inquiry.

AD REVISION OF SENTENCE

[21] The acting judicial head's argument that the record does not show any direction with regard to the revision of sentence is unfounded. The following is stated in the original record – '*Rights in respect of application for leave to explain (sic!) in full*'. On a careful reading of the typed record it is clear that rights in respect of the application for leave to appeal and review were explained to the accused – and he understood. The presiding magistrate also certified in the 'Application for Special Review Case' that the prisoner was on the said date informed that the proceedings would be sent for review by the Gauteng Provincial Division of the Supreme Court of South Africa within seven days. I am satisfied therefore that these rights were explained to the accused in full.

OTHER IRREGULARITIES

[22] There are other various irregularities which were brought to my attention by the DDPP, namely –

23.1 The Application for Special Review Case mistakenly states that the accused was of the offence of: (1) robbery, (2) malicious injury to property. These two convictions are clearly wrong as the accused was not found guilty of either of the two convictions.

23.2 The typed J15 does not reflect the accused's plea.

23.3 The typed J15 erroneously states the sentence on count 1 as '*3 years direct imprisonment of which 2 years is suspended for 5 years*' whereas the original J15 states the sentence as '*3 years direct imprisonment of which 2 years is suspended for 5 years on condition accused does not become convicted (sic!) of theft or similar offence during period of suspension.*'

23.4 The acting judicial head refers in paragraph 2 of his letter that the accused was convicted in terms of s 112 (2) of the Criminal Procedure Act. This is not correct. The accused was convicted in terms of s 112 (1) *(b)* of the Criminal Procedure Act. This is apparent right through the record if one had taken the time to carefully read the record.

23.5 A further argument by the acting judicial head is that the sentence in this matter warranted to be dealt with in terms of s 302 (2) *(b)* of the Criminal Procedure Act. This argument is entirely misplaced. Paragraph *(b)* of s 302 (2) of the Criminal Procedure Act has been deleted by s 22 of the Criminal Law Amendment Act 59 of 1983.

[24] These irregularities are indicative of the wanton manner in which the presiding officer and/or the staff at the magistrates' court Cullinan dealt with this matter. Much as the acting judicial head wanted this court to correct the proceedings of the presiding magistrate, he did not take the necessary precautions required before he could transfer this matter to this court for review. It is evident from the reading of his letter that he did not acquaint himself with the contents of the record and the relevant provisions of the Criminal Procedure Act which are applicable in this matter. In cases of this nature it is imperative that the acting judicial head should thoroughly peruse the record, which in my view he did not do, and would in that sense have picked up all these irregularities as mentioned here above. He should have noted that members of his staff improperly completed some of the forms in the record and taken steps to rectify them before sending the matter to this court. Importantly, he should have taken time to read the provisions of the Criminal Procedure Act which finds application in this matter, this in my view he did not do.

[25] In the premises I would propose to make the following order:

1. The conviction and sentence handed down on 22 April 2016 by the Magistrate S Rama are set aside.

2. The matter is remitted to the magistrates' court Cullinan for a retrial before a different magistrate.

E. M. KUBUSHI

JUDGE OF THE HIGH COURT

I agree and it is so ordered

P.M MABUSE

JUDGE OF THE HIGH COURT