

## REPUBLIC OF SOUTH AFRICA



## IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

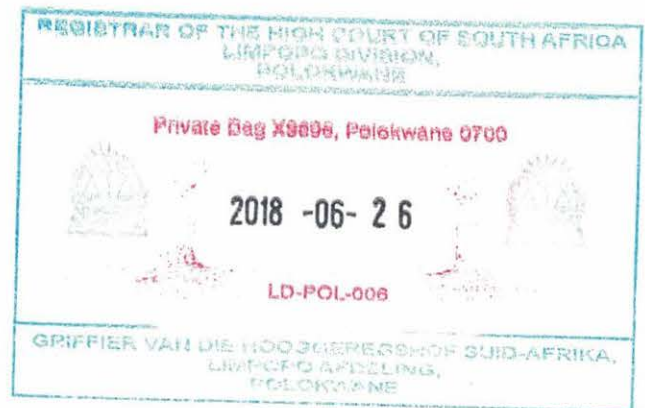
(1)	REPORTABLE: <del>YES</del> /NO
(2)	OF INTEREST TO THE JUDGES: <del>YES</del> /NO
(3)	REVISED.
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DATE	26/06/18
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GA- KGAPANE CASE NO: B673/17  
REVIEW NO: 32/2018

THE STATE

VS

MAHLORI EDWARD MOSEAMEDI



## REVIEW JUDGMENT

M.F KGANYAGO J.

- [1] This matter was brought on special review in terms of S 304(4) of the Criminal Procedure Act 51 of 1977 ("the CPA) by the Acting Judicial Head, Magistrate Ga-Kgapane.

[2] The accused appeared before Acting Magistrate Negota K on a charge of housebreaking with intent to steal and theft. He pleaded guilty to the charge. He was convicted on that charge based on his guilty plea and sentenced to twelve months imprisonment or payment of a fine of R2000-00 half of which was suspended for five years on condition that the accused is not convicted of housebreaking with intent to steal and theft.

[3] The Acting Judicial Head is of the view that the Acting Magistrate during the questioning of the accused in terms of s 112(1)(b) of the CPA did not determine the intention of the accused and also whether he was aware that his conduct was unlawful and also how he gained entry into the building. The Acting Judicial Head is further of the view that the Acting Magistrate has exceeded his jurisdiction as set out in s 302(1)(a) of the CPA as he was appointed an Acting Magistrate on the 5<sup>th</sup> June 2017 and has not worked as a presiding magistrate before his date of appointment.

[4] The Acting Magistrate in his reply to the queries raised by the Acting Judicial Head stated that he relied mostly on the inferences drawn from the accused when he explained how the offence was committed, and that what he did can

be said to be short of justice. He conceded that he had exceeded his jurisdiction when sentencing the accused to twelve months imprisonment, and that what he did amounts to an irregularity.

[5] I have requested the opinion of Deputy Director of Public Prosecutions ("the DDPP"). They have furnished me with a helpful opinion and I am indebted to them. The DDPP are of the opinion that the proceedings in the court *a quo* amounted to failure of justice and should be set aside and the matter be remitted to the court *a quo* for a trial *de novo* before another presiding officer.

[6] The purpose of s 112(1)(b) questioning is to test whether an unrepresented accused is indeed pleading guilty. The questions and answers must at least cover all the essential elements of the offence which the State in the absence of a plea of guilty would have been required to prove (**See S v Mkhize 1978(1) SA 264(N)**).

[7] Intent and unlawfulness are the essential elements of the offence of housebreaking with intent to steal and theft. From the record it does not appear that the Acting Magistrate has questioned the accused on these two

elements and also how he gained entry into the building. In his reply to the queries raised by the Acting Judicial Head, the Acting Magistrate conceded that he did not question the accused on these essential elements of the offence and that his conduct amounts to an irregularity.

[8] The essential elements of the offence have not been established and therefore, in my view, the Acting Magistrate has failed to satisfy himself that the accused fully understood and has admitted all the essential elements of the offence before convicting him. That amounted to an irregularity that taints the whole proceedings.

[9] With regard to jurisdiction the Acting Magistrate has conceded that he has exceeded his jurisdiction when he sentenced the accused to twelve months imprisonment despite being appointed as Acting Magistrate on the 5<sup>th</sup> June 2018. However, s 302 of the CPA relates to sentences subject to automatic reviews and it read as follows:

*"1 (a) Any sentence imposed by a magistrate's court-*

*"(i) Which, in the case of imprisonment (including detention in a child and*

*youth care centre providing a programme contemplated in section 191(2)*

*(j) of the Children's Act, 2005 (Act 38 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who held the substantive rank of magistrate or higher for period of seven years or longer;*

*(ii) which, in the case of a fine, exceeds the amount determined by the Minister from time to time by notice in the Gazette for the respective judicial officers referred to in subparagraph (i);*

*shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction."*

[10] This section governs automatic reviews in accordance with the rank of a magistrate. It does not prescribe the sentence which a magistrate should impose. In my view, an Acting Magistrate has the same powers and/or authority which a magistrate with a substantive rank has. He or she may impose any sentence which a magistrate with substantive rank can impose as long as it is within the jurisdiction of that court. This section does not limit the powers of an Acting Magistrate in relation to which sentence to impose. An Acting Magistrate is required to perform any other duties which may be performed by a

magistrate who hold a substantive rank. Therefore, in my view, the complaint raised by the Acting Judicial Head has no merit on this aspect.

[11] However, in relation to questioning in terms of section 112(1)(b), proceedings are not in accordance with justice. The irregularity on this aspect is so gross to extent that the whole proceedings stand to be reviewed and set aside. The accused was not afforded a fair trial.

[12] It is not clear whether the accused has been released pending the outcome of this review or whether he has already paid the fine. If he was unable to pay the fine and has been in custody from the date he was sentenced, it will be unfair for him to be subjected to another trial. In my view it will therefore not be in the interest of the accused for matter to be remitted to the court *a quo* for a trial *de novo*.


[13] In the result I make the following order.


13.1 The conviction and sentence of the accused is reviewed and set aside.

13.2 If the accused has paid the fine or a portion of it, he should be refunded in full.



I agree

  
**MF KGANYAGO J**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO PROVINCIAL DIVISION, POLOKWANE**

  
**MV SEMENYA J**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO PROVINCIAL DIVISION, POLOKWANE**