REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

REV 59/2023

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

DATE..... SIGNATURE:.....

In the matter between:

THE STATE

And

CLIFE PESCAR MACHUBENI **ACCUSED**

JUDGEMENT

KGANYAGO J

[1] The accused appeared before magistrate LE Rousseau at Ga-Kgapane magistrate court on one count of assault common. Before the commencement of the trial, the State prosecutor notified the court that the accused was conducting his own defence, and thereafter put the charges to the accused. The accused pleaded guilty to the charge, and the court *a quo* without questioning the accused in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA) found him guilty. Thereafter the accused addressed the court on mitigating factors from the dock and was sentenced to a fine of R3000.00 or one year imprisonment suspended for three years. The transcribed record of the judgment on sentence is a six-line page.

[2] After the sentence was passed, the presiding magistrate sent the matter on automatic review more than a year later, and in his memo has stated that the sentence is reviewable as the alternative of imprisonment exceeds the jurisdictional limit determined in s 302(1)(a)(i) of the CPA. When the matter was laid before me for review, I raised some queries with the presiding magistrate asking whether the accused rights to legal representation were explained to him, and also encouraged to have one before pleading. Further I requested the presiding magistrate to comment on why he did not question the accused in terms of section 112(1)(b) of the CPA to determine whether he was admitting the essential elements of the offence.

[3] In reply to the queries raised, the presiding magistrate stated that at the first appearance the accused's rights to legal representation were explained, and he elected to conduct his own defence (which is not correct as the accused elected to be represented by a Legal Aid practitioner), and thereafter he was not encouraged to engage legal representation. Further that the accused was

not questioned in terms of s 112(1)(b) as the magistrate intended applying s 112(1)(a), but erred when imposing the alternative of imprisonment of one year, whereas the limit is three months. That the fine is within the jurisdictional limit, but the alternative is in excess.

[4] I have also requested the Deputy Director of Public Prosecution (DDPP) to comment and they have provided me with the valuable opinion which I am indebted to them. According to the DDPP the proceedings cannot be said to be in accordance with justice. That it is not known what advise the legal representation would have been given to the accused during trial. Further that considering the whole trial, the accused has clearly suffered prejudice in that the matter proceeded without his legal representative in court and without any reasons furnished on the record on why he was not represented. With regard to sentence the DDPP has stated that the presiding magistrate had acted *ultra vires* when sentence was imposed as he did not have the powers to impose such a sentence. That the accused was prejudiced, and the conviction and sentence be set aside, and the trial to start *de novo* before another magistrate.

[5] The record of the 19th January 2022 shows that when the accused made appearance in court, he had elected to be represented by a Legal Aid practitioner. However, when the accused made an appearance in court on 24th March 2022 before the charge was put to him, the State prosecutor informed the court that the accused will be conducting his own defence. It does not appear from the record as to when did the accused changed his mind of been represented by a Legal Aid practitioner to conducting his own defence. The presiding magistrate also did not enquire from the accused whether indeed he

will be conducting his own defence. What the court *a quo* did was give the State prosecutor permission to put the charge to the accused.

[6] The record after the charge was put to the accused read as follows:

"COURT: Do you understand the charge?

ACCUSED: Yes.

COURT: And how do you plead?

ACCUSED: Guilty, your worship.

PROSECUTOR: State accepts the plea in terms of section 112(1)(a).

COURT: You are found guilty as charged, sir. Does the State prove any previous convictions?"

[7] The right to legal representation has been entrenched in section 35(3)(f) and (g) of the *Constitution of the Republic of South Africa Act*[1]. It was the duty of the magistrate to have enquired from the accused who was unrepresented whether indeed he had changed his mind regarding his right to legal representation by the Legal Aid practitioner. The magistrate should also have explained to the accused the implications of conducting his own defence and the consequences of not being legally represented, and also encouraged him to be legally represented. (See *S v May*[2] and *S v GR*[3]).

[8] It is trite that failure by the by a presiding judicial officer to inform an unrepresented accused of his right to legal representation, if found to be an irregularity, does not *per se* result in an unfair trial necessitating the setting aside of the conviction. It must be shown that the conviction has been tainted

[1] 108 of 1996
[2] 2005 (2) SACR 331 (SCA)
[3] 2015 (2) SACR 79 (SCA)

by the irregularity to the extend that the accused has been prejudiced. (See *S v GR* above). It is clear from the record that the magistrate did not embark on an enquiry to find out whether indeed the accused was no longer seeking legal representation, warn him of the implications of conducting own defence and encourage him to have one before he could plead. The magistrate only took the word of the prosecutor without confirming with the accused. When requested to comment on the queries raised by this court, he did not place the correct information, but stated that the accused had elected to conduct his own defence at his first appearance whilst the record state otherwise, which this court finds to be disturbing. It is his duty to ensure that correct information is placed before us to enable us to apply our minds to the matter properly, and not try to place information that favour him.

[9] It was gross irregular for the magistrate to have taken the Prosecutor's word that the accused will be conducting his own defence without verifying that with the accused, since the accused had already elected to be represented by a Legal Aid practitioner. That in my view had prejudiced the accused and his trial was not fairly conducted.

[10] It is trite that when an accused person elects to plead guilty, he or she must admit all elements of an offence. Generally, an unrepresented accused will not be able to know all the elements of the offence, and will merely tender a general plea of guilty. It is therefore the duty of the judicial presiding officer to satisfy himself/herself that the accused has admitted all the essential elements of the offence before he/she can be found guilty in accordance with his/her guilty plea. That can be achieved by the questions and answers which will cover all the

essential elements of the offence, which if the accused had pleaded not guilty, the State would have been required to prove.

[11] In *S v Nyanga*[4] Moosa J said:

> "Section 112(1)(b) questioning has a twofold purpose; firstly, to establish the factual basis for the plea of guilty and, secondly, to establish the legal basis for such plea. In the first place of the enquiry, the admissions made may not be added to by any other means such as a process of inferential reasoning…The second phase of the enquiry amounts essentially to a conclusion of law based on admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence has been met. They are the questions of unlawfulness, *actus reus* and *mens rea.* These are conclusions of law. If the court is satisfied that the admissions adequately cover all these elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty".

[12] From the record it is clear that the accused was convicted solely on his guilty plea which lacked the essential elements of a guilty plea. There was no enquiry by the court *a quo* to determine whether the accused was admitting all the essential elements of the offence. The accused did not make any admissions in relation to the offence he was facing, except for tendering a general plea. A plea of guilty on its own is not sufficient to secure a conviction on the offence on which the accused is facing. In some instances in happens that through the questioning by the court, the answers which accused gives raises a defence which the court will be obliged to enter a plea of not guilty in terms of section 113 of the CPA.

[13] It also happens that the unrepresented accused might have pleaded guilty out of ignorance and questioning by the court in terms on section 112(1)(b) will come to the rescue of that unrepresented accused. It was therefore gross

[4] 2004 (1) SACR 198 (C) at para 7

irregular for the court *a quo* to have convicted the accused solely based on his general guilty plea without the court ensuring that the accused makes admissions that adequately cover all the essential elements of the offence.

[13] With regard to sentence the magistrate has conceded that he had acted *ultra vires* by imposing a sentence of 12 months imprisonment which is beyond his limit of 3 months. Beside imposing a sentence which he did not have the powers to impose, the court *a quo* has failed to take into consideration the three elements that are necessary when determining a proper sentence. From the record, the full judgment on sentence read as follows:

> "Taking into account that the complainant is fine, though sir you are hereby sentenced to R3000.00, or you to prison for a period of one year which is suspended for a period of three years, on condition that you are not find guilty of the similar offence during the period of suspension".

[14] In *The Director of Public Prosecutions, Limpopo v Motloutsi*[5] Mokgohloa AJA said:

> "The trial court failed to take into consideration the three elements that are necessary when determining a proper sentence. These elements as enunciated in *S v Zinn* consist of the offence, the offender and interest of society. A court should strike a judicious balance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of other elements. To achieve this counterbalance a court must evaluate and evenly balance the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime to the community, its welfare and concerns".

[15] From the six-line page judgment on sentence which court *a quo* had delivered, it is clear that the magistrate did not consider any of the mitigating factors

[5] [2018] ZASCA 182 (04 December 2018) at para 19

presented by the accused and also the three elements that are necessary when determining a proper sentence. What the court *a quo* did was a miscarriage of justice. This court is mindful of the pressure and conditions under which the magistrate courts function, but that is not a ground to rush to finalise matters for statistics purposes without giving due regard to the constitutional rights of the accused to a fair trial.

[16] The accused was sentenced on 24th March 2022 and it took more than a year before the matter was sent for automatic review. The magistrate had apologised for the delay and had stated that the delay was caused by the transcription of the record. Even though the delay is quite substantial, the accused did not suffer any prejudice since he has been given a suspended sentence. Taking into consideration all these irregularities that I have pointed out above, in my view, the trial was not in accordance with justice and stands to be reviewed and set aside. It will not do any injustice if this matter is remitted back to the trial court for a trial *de novo* and it will be up to the DPP whether to reinstate the charges.

[17] In the result I make the following order:

17.1 The conviction and sentence are hereby reviewed and set aside.

17.2 The matter is remitted back to the trial court for a trial *de novo* before another magistrate should the DPP still wish to pursue the case against the accused.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

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MAKOTI AJ

ACTING JUDGE OF THE HIGH OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

Electronically circulated on : 1st August 2023