

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: REV 113/2023

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

THE STATE

And

BERNARD PHEKU MESO

ACCUSED

JUDGEMENT

KGANYAGO J

- [1] The accused is facing two separate counts of theft committed on different dates. The accused appeared before acting magistrate adv Madavha CM on 17th January 2023 on the second charge of theft and he pleaded guilty. He was convicted on that charge in terms of section 112(1)(a) of the *Criminal Procedure Act*¹ (the Act). On 3rd February 2023 the accused appeared before the same acting magistrate on the first charge of theft and he also pleaded guilty. The accused was convicted in terms of section 112(1)(a) of the Act on the second charge. The matter was postponed for presentence report due the fact that the accused was having a previous conviction and a pending similar matter of theft. On the same date the State made an application that both the first and second charges be consolidated for purposes of sentence. The State's application was granted, and both matters were postponed for presentencing report.
- [2] On the date on which the accused was supposed to be sentenced, the acting magistrate raised the issue that the procedure which he had followed in consolidating both matters might have amounted to an irregularity which might result in an injustice to the accused. The acting magistrate referred this matter for special review in terms of section 304A of the Act. According to the acting magistrate, the consolidation should have been done before the accused pleaded.
- [3] When the matter was laid before me for special review, I sought to have the input of the Deputy Director of Public Prosecutions (DDPP) on the matter. The DDPP have given me the valuable input on this matter and I am indebted to them. In their opinion charges can only be joined before the evidence is led, and that the

¹ 51 of 1977

order of the court *a quo* in consolidating the two charges be set aside, and the accused be sentenced separately on each charge.

- [4] In terms of section 81 of the Act any number of charges against an accused may be joined provided this is done before evidence is led on any one of those charges. In *S v Witbooi*² it was held that although s 81 of Act provides that any number of charges can be joined in the same proceedings against an accused “at any time before any evidence with regard to any particular charge is lead”, it is the intention of the Act that no additional charges can be joined after the actual trial has commenced, and therefore that no additional charges can be joined after questioning instead of evidence has taken place in terms of s 112(1)(b) of the Act.
- [5] If an accused pleads guilty to the charge there is no need for the State to lead evidence. What follows will be questioning by the court to determine whether the accused admit all the elements of the offence. This questioning by the court replaces the leading of the evidence by the State. Therefore, after this questioning, it is not permissible to join any other additional charges which the accused might be facing to the one which the accused had pleaded guilty.
- [6] In the case at hand the accused was facing two separate charges which were committed on different dates and are not related to each other. Further the accused first appearance in court on those separate charges was on separate dates. The first charge was only added after the accused had pleaded, questioned and convicted on the second charge. It was therefore irregular for

² 1980 (2) SA 911 (NC)

the court *a quo* to have added the first charge to second charge after the accused has been convicted.

[7] The question is whether this irregularity will taint the entire proceeding. In *S v Yusuf*³ it was held that where the guilt of the accused has been proved beyond reasonable doubt, the mere existence of the irregularity will not taint the whole proceedings. In the case at hand the record of the proceedings shows that the accused had pleaded separately to both charges, and the consolidation was only for sentencing purposes. The record further shows that the accused had been correctly convicted on both charges and there is nothing to fault the court *a quo* in relation to the conviction of the accused on both charges. It will therefore be in the interest of justice to set aside the consolidation order only, and the conviction on both charges to stand.

[8] In the result the following order is made:

8.1 The conviction of the accused on both charges of theft is confirmed.

8.2 The consolidation order of the two charges of theft for purposes of sentence is reviewed and set aside.

8.3 The matter is remitted back to the court *a quo* for sentencing proceedings in respect of each charge to be conducted separately.

KGANYAGO J

³ 1968 (2) SA 52 (A) at 57D-F

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

I AGREE

PILLAY AJ

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

Electronically delivered on : 11th October 2023