REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

HIGH COURT REVIEW NO: 071274

REVIEW CASE NO: 109/07

CASE NO: 29/04/07

In the matter between:

STATE

and

EREFAAN WILLIAMS Accused

REVIEW JUDGMENT DELIVERED ON 5 SEPTEMBER 2007

DONEN AJ

1] This matter was referred to the regional magistrate for the regional division of the Western Cape for the imposition of sentence on the accused, pursuant to the provisions of Section 114 of the Criminal Procedure Act, Act 51 of 1977 ("the Act"). By virtue of the facts and

circumstances set out below the regional magistrate felt unable to proceed with sentencing and elected to refer the matter for consideration by this court in terms of the provisions of Section 304A of the Act. The view was expressed that the proceedings should be set aside and that the matter should be remitted to the district court for a trial before a magistrate other than the one who had referred the accused for sentencing. For convenience Mr Erefaan Williams is referred to below as the accused. The magistrate who presided over the trial in the district court is referred to as the magistrate.

2] The accused had stood trial before the district court on one charge of theft (count one), nine charges of housebreaking with intent to steal and theft (counts two to ten), and one charge of attempted housebreaking with intent to steal (count eleven). He was acquitted on count one and on count four. On two housebreaking charges (counts two and ten) he was found not guilty of housebreaking with intent to steal, but guilty of theft. He was convicted on six of the charges of housebreaking with intent to steal and theft as well as on the charge of attempted housebreaking with intent to steal. The accused had been charged on count one together with two co-accused. The latter were discharged at the end of the state case. This was limited to the presentation of evidence in relation to count one.

3] The accused was unrepresented. At the outset of the trial he indicated that he wished to plead guilty to ten counts. In general he suggested that his *modus*

operandi involved the commission of housebreaking and theft whenever he and his partner needed money, especially for drugs. When the first ten charges were put to him the accused pleaded guilty to all of them. He was then questioned by the magistrate in terms of Section 112(1)(b) of the Act. The problems which faced the regional magistrate arose from the manner in which the magistrate exercised her powers in terms of this section as well as the failure of the state to put the eleventh charge to the accused until a very late stage of the proceedings.

4] In terms of Section 112(1)(b) of the Act the magistrate was vested with a discretion to convict the accused at a summary trial where he had pleaded guilty to the offences on which he was charged or to the offences on which he could be convicted and the prosecutor had accepted the pleas of guilty. The jurisdictional facts for the exercise of this discretion were; firstly, that the magistrate had questioned the accused with reference to the alleged facts of the case in order to ascertain whether he had admitted the allegations in the charge to which he had pleaded guilty; and secondly, that the magistrate had been satisfied that the accused was guilty of the offences to which he had pleaded guilty.

5] It is self-evident that until the magistrate had satisfied herself with reference to all the alleged facts of the case, a possibility existed that a plea of not guilty might have to be entered. Failing the satisfaction of the magistrate, she would have had to preside over a trial during which the accused would be vested with a right to be presumed innocent.[1] During the summary trial of the accused in terms of Section 112(1)(b) of the Act as well as in any trial that might follow, the accused

1 See Section 35(3)(h) of the Constitution.

was entitled to a fair hearing before an independent and impartial magistrate.[2]

6] It is well settled that Section 112(1)(b) was designed by the legislature to protect an accused from the consequences of an unjustified plea of guilty. Accordingly the section has to be applied with care and circumspection, bearing in mind the principles above. Where an accused's responses to questioning suggest a possible defence, or leave room for a reasonable explanation other than the accused's guilt, a plea of not guilty should be entered and the matter should be clarified by evidence[3].

7] It is irregular for a magistrate, regional magistrate or judge to subject an accused to critical questioning where the latter denies an element of the offence, or to ignore the denial and to attempt to convince the accused that such denial is improper or incorrect[4]. The questioning in terms of Section 112(1)(b) of the Act should be aimed at determining what the attitude of the accused towards the allegations in the charge sheet is, and not at a determination of what it ought to be according to the view of the judicial officer.

8] The difficulties in this matter were exacerbated by the fact that the proceedings endured (from plea to conviction), through court appearances over five separate days between 26 October 2006 and 21 December 2006. The attitude of the accused towards the allegations in the charge sheet varied during this period.

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2 Compare Sections 34 and 165(2) of the Constitution.

3 See **S v Naidoo 1989 (2) SA 114 (A) at 121 F**

4 See **S v Jacobs 1978(1) SA 1176 (C)**

9] The major difficulty raised by the regional magistrate related to the questioning of the accused in relation to count six.

10] By the time that this plea was dealt with the accused had already stated that he could not remember all the incidents. In relation to count six he was asked how he broke into and entered the house of the complainant. He replied that he could not remember. The magistrate then asked the prosecutor to provide the court with details so that the accused could be reminded of how he got into the premises. Although the magistrate provided the prosecutor with the nature of the information required, the latter provided unclear information. It was suggested that a glass pane had been broken. The accused then stated that he had not broken glass at the house in question.

11] The magistrate then asked the prosecutor to pass her the docket. It appears from the record that the magistrate perused the docket and then said: " *It says you opened a window. It's a flat and you opened a window and went in?*" The accused's memory was jolted and he made the admission that he had opened the window.

12] I agree with the regional magistrate that the conduct of the district magistrate constituted a striking irregularity. The magistrate abandoned her judicial function, took over the role of the prosecution, and proposed certain allegations from the bench that were not *"allegations in the charge"*. She then elicited

admissions from an unrepresented accused that he was not personally able to make, and which he might not have made had he been properly represented.

13] In my view the reading of the police docket by the magistrate in relation to count six not only vitiates the trial on that particular count, but also the entire proceedings before the magistrate. The proceedings as a whole cannot be regarded as having been conducted in accordance with justice. Once the magistrate had examined the content of the police docket she could no longer be regarded as one who was exercising her judicial authority impartially, as required by the Constitution.

14] This irregularity was compounded by what followed. The magistrate asked the accused whether he knew that it was wrong to break into other persons' homes and steal their goods. He replied in the negative and added that he had not been in his right mind. ("*No, because I was not on my mind*") The magistrate then interrupted him, and eventually asked him whether she should call his mother and have her come and tell the Court under oath that he did not know that he could not break into people's houses and steal.

15] In answer to further questioning the accused stated that he had been high on drugs on the day in question. He did not know what he was doing on that day or every other day. He was pertinently asked by the magistrate whether this applied to all ten counts. He answered in the affirmative.

16] The magistrate then proceeded with a line of questioning, which, in my view,

constituted cross-examination. Ultimately, she put to the accused that he had known what he was doing. He answered in the affirmative. The magistrate then remarked "*quite right, so don't waste my time*". The magistrate again asked him whether he knew what he was doing was wrong and he answered in the affirmative. Finally, the magistrate said, "*Indeed. Don't waste my time. I am satisfied then you have admitted all the elements of the charge on count six."*

17] Section 112(1)(b) does not authorise questioning, cross-questioning and badgering by a judicial officer in order to obtain admissions in the manner described above.

18] As a result of the magistrate's questioning the accused was induced into making self-incriminating statements at a stage of the proceedings when the presumption of innocence had not fallen away through the reasonable and justifiable questioning contemplated by Section 112(1)(b).

19] In the circumstances the trial of the accused was unfair in that the court was not impartial and failed to protect the rights of the accused in accordance with the provisions of Sections 34, 35(3)(h) and 35(3)(j) of the Bill of Rights.

20] Albeit that Section 112(1)(b) of the Act establishes an inquisitorial regime, the status of the statements made by the accused in answer to the questions put by the magistrate (and his guilt) were inconclusive until the magistrate had lawfully satisfied herself that the accused was guilty of the

offences to which he had pleaded guilty. Statements made in answer to questions put in terms of the section had to be obtained fairly.

21] After the completion of the Section 112(1)(b) procedure in respect of counts two to ten, the two co-accused (who were legally represented), pleaded not guilty to count one. The matter was then postponed on two occasions for trial. Upon resumption of proceedings the magistrate informed the accused that his admissions on counts two and ten supported convictions on the competent verdict of theft, but not on the main charge. He was asked whether he wished to add anything to his plea explanation on those two counts. He then expressed the desire to make a statement in respect of all the counts on which he had pleaded guilty. He stated that he was told to plead guilty. He was asked what he meant by that. He replied that he had been told to plead guilty in all of the cases because "*he pointed the houses to the police*". He was then asked whether he was pleading guilty because he felt he was guilty. He answered in the affirmative.

22] The magistrate then asked him whether he had gone into all the houses and stolen. He answered in the affirmative. However, by that stage, given the qualifications he had attached to the facts that he had admitted, pleas of not guilty should already have been entered.

23] At the conclusion of the trial on count one, while the prosecutor was busy addressing the court, it came to light that the accused had not been asked to plead to count eleven. This charge was then put. The accused asked for details. The magistrate asked the prosecutor to give the accused "*the basics*

from the A1 statement in the docket". The nature of the premises that had been subjected to the alleged attempt was apparently unclear. The magistrate suggested that the attempted housebreaking had occurred at an apartment. The accused pleaded guilty. A questioning in terms of Section 112(1)(b) then took place. The accused was found guilty on that count as well as on counts two, three, five, six, seven, eight, nine and ten after the prosecutor had accepted the pleas of guilty.

24] The regional magistrate contends further, that the provisions of section 105 of the Act were contravened in that these expressly require the charge to be put to the accused by the prosecutor before the trial is commenced. The object of this provision, which is peremptory, is to allow the accused to know what the case is that he has to meet at the outset of the trial[5].

25] In my view it is not necessary to examine the last submission in any detail, because the circumstances above render the proceedings as a whole unfair and vitiate them accordingly. Nevertheless, in the context of the many charges that the accused faced, he may well have been inclined to plead not guilty to the alleged attempt that he could not remember; that is, had the vague charge on count eleven been put to him together with the other charges. Accordingly, had the magistrate remained impartial and had she conducted the proceedings as a whole lawfully in accordance with Section 112(1)(b) of the Act, a plea of not guilty would probably have had to be recorded in respect of count eleven, because the

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5 See **S v Sithole & others 1999 (1) SACR 227 (T)**

attitude of the accused was that he did not know what he was doing.

26] In the circumstances therefore I respectfully agree with the conclusion drawn by the regional magistrate. The convictions of housebreaking with intent to steal and theft on counts three, five, six, seven, eight and nine, the convictions of theft on counts two and ten, and the conviction of attempted housebreaking on count eleven are set aside. The matters are remitted to the district court for trial before another magistrate.

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DONEN, AJ

I agree. It is so ordered.

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VAN ZYL, J