IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

High Court Ref. No.:071235

Case No.: V5/07
Serial No.: 17/07

"REPORTABLE"

In the matter between:

THE STATE

and

GRAILINE WILLIAMS

REVIEW JUDGMENT: 4 FEBRUARY 2008

LE GRANGE, J:

[1] This matter comes before me by way of automatic review. The accused appeared before a magistrate in the District Court of Paarl, on a charge of fraud and alternatively, a contravention of section 12(2), read with section 18 of the Social Assistance Act, 1992 (Act 59 of 1992) – *(receiving social assistance from the department of Social Development in the amount of R12 733.86 knowing that she was not entitled*

thereto.)

[2] The main charge was withdrawn against the accused in the court *a quo*, and the accused pleaded guilty to the alternative charge. The prosecutor then indicated to the magistrate that he does not require the court to question the accused. The magistrate forthwith applied section 112(1) (a) of the Criminal Procedure Act, 51 of 1977, *("the Act")*, to convict the accused.

[3] In considering an appropriate sentence, the magistrate imposed the following sentence:-

> "a fine of R12 000 or 8 months imprisonment, which was totally suspended for 5 years on condition that the accused –
>
> *(a) Is not convicted of the crimes of Fraud, Theft or a contravention of section 21 of Act 13 of 2004, committed during the period of suspension; and*
>
> *(b) Repays the full amount of R12 733-86 minus R570-00, in monthly installments of R210-00 to the Trust Fund of the Investigation Unit."*

[4] The sentence imposed by the magistrate was, in my view, inconsistent with the provisions of section 112(a) of the Criminal Procedure Act. I elected to raise my concerns with the magistrate. I also requested the comments of the Director of Public Prosecutions *(DPP)* in this regard. I wish to express my gratitude to the Director, Mr de Kock, and in particular Mr JC Gerber, SC for their comprehensive memorandum.

[5] The magistrate in his reply was adamant that the sentence imposed was appropriate and in accordance with the provisions of Section 112(1)(a). The magistrate also made reference to the fact that the accused was not sentenced to a term of direct imprisonment.

[6] The provisions of Section 112(1)(a) have been discussed and considered in a number of reported decisions, including decisions of this Division in recent years. See S v Daniels 1991(1) SACR 449 C; Commentary on the Criminal Procedure Act by Du Toit *et al* pg 17-3; Hiemstra Suid Afrikaanse Strafproses sesde uitgawe at pg 333, and the cases referred to therein. If one has regard to the relevant case law and legal authority on this issue, there can be little confusion as to the correct interpretation of the subsection.

[7] For the purpose of this matter, it is perhaps necessary to refer to the provisions of Section 112(1)(a) again, which provides as follows:-

> "(1) *Where an accused 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 that plea-*
>
> *(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from*

time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and-

(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from the time to the time by notice in the Gazette; "

[8] The Minister determined that the fine may not exceed the amount of R1500.00. See: Government Gazette number 24393 dated 14 February 2003. The fine imposed by the trial magistrate is clearly not within the parameters of section 112(1) (a) as the fine exceeds the amount fixed by the Minister in respect of this section. This is also the submission made by the Director of Public Prosecutions.

[9] The reference by the magistrate that the accused was not sentenced to direct imprisonment is rather surprising. The subsection, on a proper interpretation, authorizes a presiding officer to convict an accused on his bare plea of guilty only in circumstances where the offence in question does not merit imprisonment or any other form of detention without the option of a fine which fine is presently R 1500.00 as determined by the Minister, (see Government Gazette, *supra*) and prohibits, in effect, the imposition of a sentence of imprisonment that is not coupled with a fine.

[10] The magistrate's understanding and interpretation of the penal provisions of

section 112(1)(a) is thus clearly wrong. An improper sentence was imposed that needs to be set aside.

[11] The contention by the DPP that, not only the sentence but also the conviction be set aside as a result of the irregularity committed by the magistrate is not without merit. It will be wrong, in my view, to only set aside the sentence without taking into consideration the lawfulness of the conviction.

[12] The jurisdictional fact required by section 112(1)(a), is that the magistrate must be of the opinion that the offence, an accused pleads guilty to, does not justify a sentence in excess of R 1500.00 *before* he is entitled to convict the accused on his plea of guilty. This approach must also be read in context with the peremptory provision of section 112(1)(b) where a magistrate is compelled to – in the event that he is of the view that the offence justifies a fine in excess of R 1500.00 – question the accused with regards to the alleged facts of the matter in order to ascertain whether the accused admits the allegations in the charge on which he pleaded guilty. In this regard see S v Addabba; S v Ngeme; S v Van Wyk 1992 (2) SACR 325 T at 329 *f-g.*

[13] In *casu,* the magistrate recorded the following reasons for the sentence imposed:-

> "The accused was not sent to direct imprisonment. He (sic) is a first offender, is married, unemployed but have a joint income with her husband of

 R950.00 per week. She is willing to pay the amount back in installments of R210.00 per week. Approximately 43 000 00 people are abusing the social grant system in South Africa. A to lenient sentence will have no
determent (sic) effect. The court also took into account that accused will take approximately 5 years to pay back the money which she unlawfully received. The suspended sentence of R 2 000.00 (sic) or 8 months imprisonment will have a determent (sic) effect on other offenders as on the accused."

[14] It is abundantly clear from the recorded reasons that the magistrate considered the offence the accused pleaded guilty to, sufficiently serious not to impose a too lenient sentence, which according to him, will have no deterrent effect. The magistrate erred in failing to apply his mind to the jurisdictional fact required by the subsection before convicting the accused on her bare plea of guilty and the conviction can, in terms of the provisions of the subsection, not be in accordance with justice.

[15] Section 112(1)(a) was, and still is intended for minor offences and should be used sparingly and only where it is certain that no injustice will result from its application. See: S v Addabba; S v Ngeme; S v Van Wyk *supra* at 332 *e.*

[16] The conviction and sentence in this matter is not in accordance with justice and should be set aside.

[17] In the result I will make the following order.

1. The conviction and sentence is set aside.
2. The matter is remitted to the magistrate to act in terms of the provisions

of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977.

LE GRANGE, J

I agree.

VELDHUIZEN, J