Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

High Court Ref No: 15284
Magistrate's serial No: 2/2015
CASE NO: B14/2015

DATE: 18 MARCH 2015

From the Court of the Magistrate for the District of **MALMESBURY** held at **ATLANTIS**

In the matter between:

THE STATE

And

WHAYLIN WILLEMSE

REVIEW JUDGMENT

BINNS-WARD J:

This matter was sent to this court on special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 by the magistrate at Atlantis.

The accused, who was legally represented, pleaded guilty before a probationer magistrate to a charge of malicious injury to property. The trial magistrate elected to accept the plea in terms of s 112(1)(a) of the Criminal Procedure Act. Malicious injury to property (in the current case the charge sheet had disclosed that the value of the property concerned was R1 500) is a serious offence, and thus one in respect a sentence of direct or suspended imprisonment, or correctional supervision coupled with a suspended sentence of imprisonment should have been regarded as eminently

foreseeable possibilities. The magistrate's election in the circumstances to convict the accused in terms of s 112(1)(a) was therefore injudicious, to say the least.

The trial magistrate imposed a sentence of six months' imprisonment wholly suspended for a period of three years on condition that the accused is not convicted of malicious injury to property committed during the period of suspension. Section 112(1)(a) of the Criminal Procedure Act provides:

> 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 of 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 time to time by notice in the Gazette; or
>
> (ii) deal with the accused otherwise in accordance with law.

A wholly suspended period of imprisonment is, despite the order of suspension – which is conditional – a punishment of imprisonment. The sentence imposed was thus plainly not a competent one in terms of s 112(1)(a)(i) of the Criminal Procedure Act.

In the letter under cover of which the record was sent on review, the district magistrate recorded that the matter had been discussed with the presiding officer at the trial and with the accused's legal representative and advised that they had indicated that they did not wish to make any written comment. He requested that the sentence imposed by the trial magistrate be set aside and the matter remitted for the consideration of sentence afresh.

In my judgment the failure of justice in the proceedings was more fundamental than the magistrate's request appears to recognise. As pointed out by Le Grange J (Veldhuizen J concurring) in *S v Williams* 2009 (1) SACR 192 (C), at para 12, '*The jurisdictional fact required by s 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 R1 500* [the amount has since been increased to R5 000] *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 s 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 R1 500 - question the accused with regard 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 329f – g'. (A punishment of imprisonment without the option of a fine must be understood to be 'a sentence in excess of a fine' for the purposes of the quoted passage.) Accepting a submission from the Director of Public Prosecutions to that effect, the court in *Williams* held that, in the context of a failure by the magistrate to have applied his mind to the jurisdictional fact, not only the sentence, but also the conviction had to be set aside.

It is evident upon a perusal of the record in the current matter, from which it is apparent, amongst other matters, that the magistrate thought it appropriate, when informed that there was a suggestion that the accused had a previous conviction for robbery, to remand the case for the previous conviction to be proved - which, in context, could only have been to consider the appropriateness of a custodial sentence - that the presiding officer had not applied his mind to the relevant jurisdictional fact when he elected to convict the accused without first questioning him in the manner contemplated by s 112(1)(b) for his conduct was irreconcilable with any appreciation by him of the limitations imposed by the course he had elected to adopt.

In circumstances directly comparable to those in this case the court in *Williams* held as follows at para 14-17 of the judgment:

> [14] ….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 332e.
>
> [16] The conviction and sentence in this matter are not in accordance with justice and should be set aside.
>
> [17] In the result I make the following order.
>
> 1. The conviction and sentence are set aside.
> 2. The matter is remitted to the magistrate to act in terms of the provisions of s 112(1)(b) of the Criminal Procedure Act 51 of 1977.

The cases being essentially indistinguishable, it seems to me that a similar result should follow in the current matter. The following order is made:

1. The conviction and sentence are set aside.
2. The matter is remitted to the magistrate's court for the trial to be commenced *de novo* before a different magistrate.

A.G. BINNS-WARD
Judge of the High Court

SAVAGE J:

I agree.

K.M. SAVAGE
Judge of the High Court