

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

High Court Review No: 18808

Magistrates' Serial No: 07/18

Magistrates' Case No: A3055/16

In the matter between:

THE STATE

and

KHALIL KARAN

SPECIAL REVIEW JUDGMENT DATED 26 MARCH 2019

DAVIS, AJ (ERASMUS, J concurring):

1. This matter comes before us by way of special review in terms of s 304 (4) of the Criminal Procedure Act 51 of 1977 ("the CPA"). It concerns the power of a magistrate in terms of s 57(7) of the CPA to set aside a conviction and sentence in terms of an admission of guilt on the grounds that the sentence is not adequate, and to direct that the accused be prosecuted in the ordinary course.

2. The accused was charged in the Strand Magistrates' Court with contravening Regulation 36(1)(b) of the Regulations promulgated under the Marine Living Resources Act 18 of 1998 ("the MRLA Regulations")¹ it being alleged that on 16 September 2016 and at the Strand he was in possession of 192 shucked abalone without a permit. He was arrested on 16 September 2016 and first appeared in court on 19 September 2016, when he was released on bail of R 3 000.00. The public prosecutor subsequently issued a notice in terms of s 57A of the CPA ("the s 57A notice") in terms whereof the accused was informed that an admission of guilt fine of R 10 000.00 was payable in respect of the offence.²

3. The accused paid the acknowledgment of guilt fine on 28 March 2017. In terms of the procedure laid down in s 57(6) of the CPA, the s 57A notice was forwarded to the clerk of the court to enter the particulars in the criminal record book for admissions of guilt, whereupon the accused was deemed to have been convicted and sentenced in respect of the offence, subject to s 57(7) of the CPA.³

¹ Regulation 36(1)(b) states that "No person shall transport or be in possession of any abalone that is not in the whole state, except on the authority of a permit."

² Section 57A(1) reads as follows:

"If an accused who is alleged to have committed an offence has appeared in court and is –

(a) in custody awaiting trial on that charge and not on another more serious charge;

(b) released on bail under section 59 or 60; or

(c) released on warning under section 72,

the public prosecutor may, before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, hand to the accused a written notice, or cause such notice to be delivered to the accused by a peace officer, containing an endorsement in terms of section 57 that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a stipulated fine in respect thereof without appearing in court again."

³ Section 57(6) provides that:

"An admission of guilt fine paid at a police station or a local authority in terms of subsection (1) and the summons or, as the case may be, the written notice surrendered under subsection (3), shall, as soon as is expedient, be forwarded to the clerk of the magistrate's court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice surrendered to the clerk of the court under subsection (3), in the criminal record book for admissions of guilt, whereupon the accused concerned shall, subject to the provisions of subsection (7), be deemed to have been convicted and sentenced by the court in respect of the offence in question."

4. The documents were then presented to the magistrate in accordance with s 57(7) of the CPA, which provides for the review by a magistrate of the conviction and sentence imposed by way of the admission of guilt procedure. The magistrate noted that there was no magisterial determination in terms of s 57(5) of the CPA of the offence in question. Having regard to the serious nature of the offence she considered that the admission of guilt fine set by the prosecutor was not in accordance with justice. She therefore set aside the conviction and sentence, and directed that the accused be prosecuted in the ordinary course.

5. The public prosecutor, however, disputed the magistrate's entitlement to set aside the conviction and sentence, contending that she was entitled to determine an admission of guilt fine in the amount of R 10 000.00 for the offence in question. She requested that the magistrate submit her decision in terms of section 57(7) to this court for special review in terms of s 304(4) of the CPA.

6. The relevant statutory provisions for present purposes are sections 57(4), (5) and (7) of the CPA, which read as follows:

“(4) No provision of this section shall be construed as preventing a public prosecutor from reducing an admission of guilt fine on good cause shown.

(5) (a) An admission of guilt fine stipulated in respect of a summons or a written notice shall be in accordance with a determination which the magistrate of the district or area in question may from time to time make in respect of any offence or, if the magistrate has not made such a determination, in accordance with an amount determined in respect of any particular summons or any particular written notice by either a public prosecutor attached to the court of such magistrate or a police official of or above the rank of noncommissioned officer attached to a police station within the magisterial district or area in question or, in the absence of such police

official at any such police station, by the senior police official then in charge at such police station.

- (b) An admission of guilt fine determined under paragraph (a) shall not exceed the maximum of the fine prescribed in respect of the offence in question or the amount determined by the Minister from time to time by notice in the Gazette, whichever is the lesser.
- (7) The judicial officer presiding at the court in question shall examine the documents and if it appears to him that a conviction or sentence under subsection (6) is not in accordance with justice or that any such sentence, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the sentence is not adequate, such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the admission of guilt fine which has been paid exceeds the amount determined by the magistrate under subsection (5), the said judicial officer may, in lieu of setting aside the conviction and sentence in question, direct that the amount by which the said admission of guilt fine exceeds the said determination be refunded to the accused concerned.” [Emphasis added]

7. The effect of s 57(5) of the CPA is that a magistrate may determine admission of guilt fines for particular offences within his area of jurisdiction, subject to any applicable statutory limits for the offence in question and the maximum amount determined by the Minister from time to time, which is currently R 10 000.00 (in terms of GN R62 in GG 36111 of 30 January 2013).⁴ And where the magistrate has not made a determination for the offence in question, the amount may be determined by a public prosecutor or police official, subject to the limit of R 10 000.00 or any applicable statutory maximum, whichever is the lesser. The sentence imposed in terms of a determination by a public prosecutor or police official is subject to review by the magistrate in terms of s 57(7) of the CPA.

⁴ In terms of Government Notice GN R 62 in Government Gazette Number 36111 of 30 January 2013.

8. There was no magisterial determination of admission of guilt fines for Strand for the particular offence for which the accused was charged, namely contravention of regulation 36 in regard to abalone. Such determinations did exist, however, for certain contraventions of the MRLA Regulations, such as regulations 42 and 43 dealing with oysters and regulation 44 dealing with rock lobster.

9. The magistrate's determination in regard to these other offences under the MRLA Regulations reveal that the quantity of unlawful items found in accused's possession plays a role in the severity of the sentence, and accordingly whether or not an admission of guilt fine is appropriate. Thus, for instance, one sees that no admission of guilt fine may be set where a person is found in unlawful possession of more than 100 oysters, or more than 5 rock lobster, or 5 shellfish or 5 tuna fish, on account of the number involved.

10. Inasmuch as there was no determination governing the unlawful possession of abalone, the prosecutor was empowered under s 57(5) to set an admission of guilt fine in an amount of up to R 10 000.00, in accordance with the current ministerial limit. Her decision, however, is in terms of s 57(7) subject to review by the magistrate, who is required to be satisfied that the sentence is in accordance with justice.

11. In the exercise of her discretion under s 57(7) the magistrate was entitled to find, having regard to the seriousness of the offence, that the sentence was inadequate, and to set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course.

12. The prosecutor contends that her decision to fix the fine admission of guilt fine at R 10 000.00 is immune from review by the magistrate in terms of s 57(7) of the CPA because s 57(4) provides that “[n]o provision of this section shall be construed as preventing a public prosecutor ... from reducing an admission of guilt fine on good cause shown.”

13. This argument is misconceived. The effect of s 57(4) is that a prosecutor is entitled, on good cause shown, to reduce an admission of guilt fine which has been duly set by a magistrate, prosecutor or police official in terms of s 57(5). But in this case the prosecutor did not reduce an admission of guilt fine. She simply fixed an admission of guilt fine in circumstances where there was no magisterial determination.

14. The question whether a magistrate is entitled to set aside a sentence in circumstances where the prosecutor has exercised the discretion in s 57(4) to reduce the fine below the amount fixed in a magisterial determination does not in fact arise in this case because there was no magisterial determination in respect of the relevant offence. However, since there appears to be confusion about the inter-relation of a prosecutor’s power under s 57(4) and a magistrate’s power under s 57(7), I consider that it desirable to provide clarity on this issue.

15. Section 57(4) confers a discretion on a public prosecutor, on good cause shown, to reduce the amount of an admission of guilt fine below the amount determined by a magistrate, prosecutor or police official in terms of s 57(5). The

phrase “*reduce an admission of guilt fine*” refers to the power to impose a lower fine than the fine determined in terms of s 57(5) for the offence in question.

16. Section 57(7) confers a power of review on the magistrate. It empowers the magistrate to intervene and set aside any conviction and/or sentence in terms of an admission of guilt where it appears to him or her that:

16.1 the conviction or sentence is not in accordance with justice; or

16.2 the sentence is not in accordance with a magisterial determination (except where the amount of the admission of guilt fine has been reduced by the prosecutor on good cause shown in terms of s 57(4));
or

16.3 the determination has not been made by the magistrate but by a public prosecutor or police official in terms of s 57(5), and the sentence is inadequate.

17. In *S v Hanekom* 1984 (4) SA 108 (T) (at 110I – 111A) Leveson J expressed the view, *obiter*, that where a prosecutor has exercised the power in terms of s 57(4) to reduce an admission of guilt fine below a magisterial determination, the magistrate cannot set aside the sentence even if it is perceived to be inadequate.

18. This court adopted a different view in the matter of *S v Mhlola; S v Motselbane*⁵ where Cloete J held that a prosecutor’s decision to reduce a fine in terms of s 57(4) is subject to the overriding discretion of the magistrate, who must be satisfied that the conviction and sentence are in accordance with justice in terms of s

⁵ High Court Review Judgment dated 17 August 2018 in Review Case Numbers 18803 and 18804.

57(7). I respectfully agree with the view expressed by Cloete J that the power of the magistrate under s 57(7) is not subject to the power of the prosecutor under s 57(4).

19. In my view s 57(7), properly construed, confers a broad, overarching discretion on the magistrate to ensure that the conviction and sentence are in accordance with justice. This power overrides the power of the prosecutor in terms of s 57(4). The words “*except as provided in subsection 4*” in s 57(7)⁶ not operate to immunize from magisterial review a decision of the prosecutor under s 57(4) to reduce a fine; they simply mean that where a sentence has been reduced in terms of s 57(4), the mere fact that the sentence differs from a magisterial determination will not automatically operate as a ground for review. Where a fine has been reduced in terms of s 57(4), the magistrate may intervene if he or she considers that it is not in accordance with justice.

20. The conclusion that the power of a magistrate under s 57(7) overrides a prosecutor’s power under s 57(4) is consonant with the different roles ascribed to the judiciary and the national prosecuting authority in terms of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). In terms of s 165 of the Constitution, judicial authority vests in the courts, which are subject only to the Constitution and the law. An order or decision of a court binds all persons and organs of state to which it applies. By contrast, s 179(2) of the Constitution confers on the national prosecuting authority the power to institute criminal proceedings and to carry out any necessary functions incidental to instituting criminal proceedings.

⁶ “... or that any such sentence, *except as provided in subsection (4)*, is not in accordance with a determination made by the magistrate under subsection (5)...”

21. It is trite that the sentencing of convicted offenders is the function of the courts. As Terblanche has observed, *“That the power to impose a sentence on a convicted offender is the domain of the courts, the judicial authority in South Africa, is widely accepted. This principle is so deeply imbedded in our common law that it is difficult to find any source containing a statement to this effect.”*⁷

22. I am of the respectful view that the interpretation of s 57 of the CPA which immunizes a prosecutor’s power under s 57(4) from magisterial review under s 57(7) is wrong firstly, because it conflicts with the allocation of judicial and prosecutorial functions in the constitution, and secondly, because it negates the important safeguard of judicial oversight of any sentence imposed in terms of s 57 other than by a magistrate. In the latter regard there can be little doubt that a prosecutor’s power to reduce fines in accordance with s 57(4) should be subject to judicial scrutiny to safeguard against the risk of bribery and corruption in order to secure a lenient sentence.

23. To sum up a magistrate’s powers regarding sentence in terms of s 57(7):

23.1 Where a sentence fixed in a section 57A notice is not in accordance with a determination made by the magistrate, for instance because it exceeds the determination, or is lower than the determination without the prosecutor having exercised the discretion in terms of s 57(4) to lower the fine, the magistrate may intervene.

23.2 Where a prosecutor has exercised the discretion in terms of s 57(4) to fix a reduced fine below the amount of a magisterial determination in

⁷ SS Terblanche *A Guide to Sentencing in South Africa* (3 ed) p 15.

terms of s 57(5), the magistrate, if he or she considers the sentence too lenient, may intervene on the ground that the sentence is not in accordance with justice.

23.3 Where there is no magisterial determination for an offence and the prosecutor or police official has fixed an admission of guilt fine in terms of s 57(5), the magistrate may intervene if the sentence is considered to be inadequate or, if it is considered to be too onerous, on the grounds that it is not in accordance with justice.

24. In short, in my view s 57(7) entitles, indeed obliges, a magistrate to set aside any sentence which he or she considers is not in accordance with justice, including a fine which has been reduced by the prosecutor in terms of s 57(4).

25. I therefore consider that the magistrate was entitled to set aside the accused's conviction and sentence and to direct that the accused be prosecuted in the ordinary course.

26. I would accordingly make the following order:

- (i) The setting aside of the conviction and sentence in case number A 3055/16 is confirmed.
- (ii) The fine paid by the accused is to be refunded forthwith.
- (iii) The accused is to be prosecuted in the ordinary course as provided for in s 57(7) of Act 51 of 1977.

D M DAVIS, AJ

I agree and it is so ordered.

N C ERASMUS, J