In the High Court of South Africa
(Western Cape Division, Cape Town)

[REPORTABLE]

High Court Ref No: 143/21
Magistrate Serial Number: 16/2021

In the matter between:

THE STATE

And

ASHWIN ELMIE

JUDGMENT: 11 MAY 2021

LEKHULENI AJ

INTRODUCTION

[1] This matter comes before this court by way of automatic review in terms of the provisions of section 302 of the Criminal Procedure Act 51 of 1977 (*"the CPA"*). The accused who was not legally represented after he elected to conduct his own defence was convicted in the Magistrates Court, Cape Town on 01 April 2021 on a charge of possession of drugs in contravention of section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 *("Drugs and Drug Trafficking Act")*. It was alleged by the

State that on 24 March 2021 and at or near Blaawberg in Potsdam Road in the District of Cape Town, the accused did wrongfully have in his possession an undesirable dependence producing substance as listed in Part III of schedule 2 of the Drug and Drug Trafficking Act, to wit a 1 X tik lolly containing methamphetamine. The magistrate convicted the accused after he questioned him in terms of section 112(1)(b) of the CPA and subsequently sentenced the him to 12 months' imprisonment in terms of section 276(1)(i) of the CPA. Essentially, this court is enjoined to consider whether the proceedings before the trial magistrate appear to be in accordance with justice.

[2] On 21 April 2021 this Court raised a query and requested the presiding magistrate to provide reasons for convicting the accused. This was based on the fact that the presiding magistrate did not question the accused as to his knowledge about the substance he possessed and on what basis he admitted that it was tik (methamphetamine). It was also not clear from the record why the court did not examine the certificate of analysis of the methamphetamine if it was available. To this end, this Court drew the attention of the magistrate to the case of *State of Adams and ten Others*.[1]

[3] In his quick and prompt response dated 29 April 2021, the magistrate conceded that he erred in questioning the accused. The relevant parts of his response is as follows:

> "The magistrate had considered the record and concluded that he has erred in the questioning of the accused. This is regrettable as the accused was undefended. The Court erred in the sense that it relied solely on the admission of the inexperienced and

[1] 1986 (2) SA 32 (N).

unrepresented accused. The court further erred by not following a line of closer and more in depth questioning to in fact determine the accused guilty beyond reasonable doubt."

From the explanation put forth by the magistrate, it is incumbent upon this Court to examine whether the conviction and sentence was justifiable in the circumstances.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

[4] It is a basic principle of our law that section 112(1)(b) proceedings are intended to protect especially an unrepresented or ignorant accused from the consequences of tendering an ill-considered plea of guilty.[2] The underlying purpose of the section is to make doubly sure that an accused person who pleads guilty, indeed has no possible defence.[3] Section 112(1)(b) does not provide for the conviction of the accused merely because he himself believes that he is guilty. In all cases in which an accused pleads guilty the trial court must be fully informed of the facts of the case. Questions put to an accused under section 112(1)(b) are questions about the factual elements of the criminal offence, not questions about conclusions of law to be drawn from the facts.[4]

[5] In *State v Witbooi,*[5] the court noted that Section 112 (1) *(b)* and section 112 (2) and (3) are primarily concerned with the facts of the case and to ensure that an accused person is guilty of the offence to which he has pleaded guilty and also to ensure that he is properly sentenced on the true facts of the case. The court

[2] *S v Samuels* 2016 (2) SACR 298 (WCC) at para [21].
[3] *S v Kholoane* 2012 SACR 8 (FB).
[4] *S v Zerky* 2010 (1) SACR 460 (KZN) at 469D-E.
[5] 1978 (3) SA 590 (T) at 594 – 595.

observed that where a magistrate acts under the provisions of these sections, he should follow a course that would enable him to ascertain the true facts of the case. The course recommended is to question the accused himself with reference to the alleged facts of the case in order to ascertain what his version is so that the prosecutor can know whether the account of the accused agrees with the evidence which he has at his disposal. If his account does not agree with the evidence which the prosecutor has available, the prosecutor may then decide to place his evidence before the court and it will then be for the court to adjudicate upon the facts of the case.

[6] It is the duty of the presiding officer to determine whether the accused admits all the allegations in the charge sheet and to satisfy himself that the accused is indeed guilty. For present purposes, it is apposite to quote in full the questions that were put by the court to the accused. The magistrate proceeded as follows:

> "Q. Do you plead guilty freely, voluntarily and without undue influence?
>
> A. Yes
>
> Q. What happened?
>
> A. I had a tik lollie in my hand
>
> Q Do you know tik lollie?
>
> A. Yes, I know that possessing lollie is punishable in law."

[7] These were the only questions that were put to the accused by the court. The question to be considered in this matter is whether the Magistrate was satisfied that the accused knew that the substance he had in his possession was methamphetamine as described in Drugs and Drug Trafficking Act. It seems to me

that the court a quo did not at all deal with this aspect. After questioning the accused as detailed above, the prosecutor accepted the plea and the court subsequently convicted the accused and thereafter sentenced him to twelve months imprisonment in terms of section 276(1)(i) of the CPA.

[8] I must say with respect that the questioning of the accused by the court a quo was done in a perfunctory and desultory manner. The few questions put to the accused and his response are deficient and lacking in essential details. From the above questioning, it was not ascertained from the accused whether he was admitting that the offence was committed within the jurisdiction of the court.[6] It is also not clear who found the accused in possession of the tik lolly. It is also not clear where did the accused find the tik lolly. The accused was not asked as to what was he intending to do with the tik lolly. It was also not established how the accused was arrested and who arrested him. However, in terms of the charge sheet, the accused was arrested on 24 March 2021 and appeared for the first time in court on 26 March 2021.

[9] In my view, in cases such as this, justice demands that comprehensive facts be placed before a court before a court can proceed to deprive an accused person his liberty. It must be stressed that section 112(1)(b) of the CPA enjoins the court to question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge. The object of section 112(1)(b) is defeated if admissions of unlawfulness and intent are obtained in

[6] See *S v Heugh & others* 1997 (2) SACR 291 (E).

the absence of admissions of facts which supports a finding of unlawfulness and intent.[7]

[10] With that being said, it is highly regrettable and disappointing in this case that the prosecutor accepted the accused's plea and the facts upon which the plea was based. It is highly doubtful that the terse admissions made by the accused were in line with the state's case. It must be emphasised that there were no sufficient facts placed before court on which the accused's plea was based. In my view, the acceptance of a plea under these circumstances was not at all justified as the admissions of the accused were not properly made so as to justify a conviction on the charge levelled against him.

[11] The accused in this case was unrepresented. In my view, the fact that the tik lolly that he possessed contained methamphetamine as alleged in the charge sheet, fell outside the personal knowledge of the accused. It must be emphasised that the general rule in our law of evidence is that a court may accept and rely upon an admission of an accused despite the fact that the facts admitted falls outside the personal knowledge or experience of the accused.[8] However, our courts have adopted a more cautious and prudent approach with regard to the plea proceedings in terms of section 112 and 115 of the CPA where such admissions are made by undefended accused.

[7] S v Witbooi 1978 (3) SA 590 (T) at 595B-C.
[8] *S v Phuzi* 2019 (2) SACR 648 (FB) at [36]; *S v Coyne* 1974 (4) SA 957 (E) 958G; *S v Mavundla* 1976 (4) SA 731 (N) 733A).

[12] In *S v Giavanno Otto*,[9] Henney J (with Samela J concurring), observed that admissions during plea proceedings calls for greater caution especially in cases of undefended accused. The learned Justice found that it is for this reason that it has become well established that our courts especially in cases where an admission is based on scientific and technical evidence, which may not ordinarily fall within the knowledge of an accused person requires that greater care should be taken by the judicial officer during questioning of an accused person in terms of section 112(1)(b) of the CPA. As stated above, the accused's knowledge of methamphetamine was not tested at all during questioning. In fact, the accused's admission that he knows methamphetamine was insufficient to ground a conviction. Furthermore, it is my considered view that the admission was not enough to establish that it was indeed methamphetamine in the lolly for the purposes of proving that it was an undesirable dependence producing substance envisaged by the Act.

[13] In *S v Adams en Tien Ander Soortgelyke Sake,*[10] the full bench of this court stated as follows in respect of a of guilty plea on a charge of contravening section 2(a) of Act 41 of 1971 (The predecessor to The Drug and Drug Trafficking Act 140 of 1992):

> "Where an accused is charged with contravening section 2 (a) of Act 41 of 1971 in respect of a prohibited dependence - producing substance such as mandrax, and he pleads guilty and makes the admission that the substance is indeed mandrax, the court will normally be entitled to convict him where he is represented by a legal representative. Where, however, the accused is an inexperienced person who is unrepresented, the position is different. In such an event, the court may not simply accept his admission of an unknown fact. There would have

[9] (Unreported Case Number 475/20) at para 4.
[10] 1986 (3) SA 733 (C) – Headnote at 735B-E.

to be additional grounds on which the court rely that the admitted fact is true before the court can be satisfied that the accused is guilty. The assurance concerning the acceptance of a fact which is admitted but which is beyond the personal knowledge of such an accused can be obtained in different ways, for example, by closer questioning of the accused in order to determine the strength of the knowledge of the matter and the surrounding circumstances are, or by examining the relevant certificate of analysis of the substance. Whether there is then sufficient evidence for the magistrate to convince him that the accused is guilty will depend on the facts of the particular matter. What however must still be borne in mind, is that it is the court's duty to convince itself of the accused's guilt and that the court is not relieved of this duty in this regard merely by such an unrepresented and inexperienced accused admitting a fact which is beyond his knowledge".

[14] Our courts have favoured the view that an admission that does not have its factual foundation in the personal knowledge of the accused can be accepted if the court is satisfied that the admission was well founded and is a reliable one.[11] In my view, the admission made by the accused that he knew that possession of tik lolly is punishable in law was not sufficient for the court to conclude that the accused knew that what he possessed was methamphetamine. There was nothing more placed before court to satisfy itself that this admission was true and reliable to enable the court to return a verdict of guilt as it did.

[15] More importantly, the accused did not admit that there was methamphetamine in the lolly that he possessed as alleged in the charge sheet. In his answers to the presiding magistrate, the accused only indicated that he had tik a lolly in his hand. Regrettably, the court did not ask him as to what was contained in the tik lolly. Instead, the court only asked him if he (*sic*) "knew a tik lolly". It seems to me the

[11] *S v Leboya* 2006 (1) SACR 341 (T); See also *Du Toit et al Commentary on the Criminal Procedure Act* at RS 64, 2020 ch 17-22 and the authorities quoted therein.

court convicted the accused by simply assuming that the alleged tik lolly which the accused possessed, contained methamphetamine.

[16] In my opinion, the court a quo should have done more in order to test the knowledge of the accused of this drug. The court could easily have questioned the accused about his knowledge of this substance and the reasons why he admitted that indeed it was methamphetamine and not any other substance. The court should have obtained the certificate of analysis of the methamphetamine in question from the prosecutor if same was available. The court could have also asked the prosecutor if such a certificate was filed. As the officer of the court, the prosecutor could as well have brought this certificate to the attention of the court. In *S v Chetty,*[12] this court stated as follows:

> "In the ordinary course the state can and should hand in a certificate of an analysts which proves itself and causes no problems that what has been found is what it is alleged to be. There may of course be other methods by which the questioner could satisfy himself that the accused had good reasons to accept that the pills he intended dealing in were what they purported to be or did contain the drug in question – perhaps because he had purchased them from a reliable source, or had tried one himself, or that some of his own experienced customers were satisfied with their purchase from the batch in question."

[17] In conclusion, the record further reveals that the court a quo imposed a sentence of twelve months' direct imprisonment in terms of section 276(1)(I) of the CPA. However, the court failed to explain to the accused his appeal rights in terms of section 309B of the CPA. There is also no indication whether the accused was informed that the matter will be referred to the High Court in order for it to ascertain if the proceedings before the court a quo were in accordance with justice. More

[12] 1984 (1) SA 411 (C).

importantly, the accused was not informed that he can make written representations in terms of section 303 of the CPA to the clerk of the court within three days of the imposition of sentence to accompany the record to the reviewing judge. The accused in this matter was acting in person and in my view, the court ought to have informed him of this right, especially given the fact that he was probably not aware of it and that the right of review in terms of section 302 of the CPA arises only where the accused has no legal representation.

[18] It is trite that not all irregularities are fatal and would lead to setting aside of proceedings. In *S v Ndlovu*[13], it was stated that dealing with automatic review proceedings does not require the judge to certify that the proceedings are in accordance with law but in accordance with justice. In my opinion, the irregularities committed in this matter by the court a quo are so gross in nature such that they led to a complete failure of justice - See *S v Naidoo.*[14] It is also my considered view, that an irregularity that leads to an unfair trial, constitutes a failure of justice. Of course, each case will depend upon its own facts and peculiar circumstances.

[19] Section 35 of the Constitution demands that an accused person be given a fair trial. This does not mean sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious stratagems; it simply requires that justice be done - See *Key v Attorney General, Cape Provincial Division and Another*[15].

[13] 1998 (1) SACR 599 (W) at 601.
[14] 1962 (4) SA 348 (A) 354 D-G.
[15] 1996 (6) BCLR 788 (CC) at para 13.

[20] On a conspectus of all the facts placed before us, I am of the view that the proceedings before the court a quo were not in accordance to justice. In my opinion, the irregularities committed by the court a quo led to a failure of justice that vitiated the proceedings.

[21] Having made the aforesaid findings, it follows that the conviction and sentence meted by the court a quo on the accused has to be set aside.

ORDER

[22] In the result, I would propose the following order:

22.1 That the conviction of the accused for the contravention of section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 and the sentence of twelve months' imprisonment in terms of Section 276(1)(i) be set aside.

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LEKHULENI AJ

ACTING JUDGE OF THE HIGH COURT

I agree with the judgment and proposed order of Lekhuleni AJ. I just wish to add that it seems that the Magistrate in this case were not adequately trained to properly question an undefended accused in terms of Section 112(1)(b) of the CPA.

In the recent past, a number of cases[16] had been sent on review where the questioning of undefended accused by Magistrates and subsequent convictions were not in accordance with justice. I have also been informed by judges from other divisions that this problem is not unique to our division.

It is for this reason that I am of the view, that a copy of this judgment should be sent to the secretary of the Magistrate's Commission for the purposes of training of Magistrates, especially inexperienced Magistrates.

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HENNEY J

JUDGE OF THE HIGH COURT

[16] (1) S v Giavanno Otto case 475/2020 (19 October 2020) (referred to earlier in this judgment)
(2) S v Fransman and Another 2018 (2) SAR 250 (WCC)
(3) S v Dawood Roman; case no 16871 (30 August 2016)