



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

**Case No: 1123/2022**

In the matter between:

**RAY BURT**

**Applicant**

and

**ADDITIONAL MAGISTRATE**

**First Respondent**

**DIRECTOR OF PUBLIC PROSECUTIONS,**

**WESTERN CAPE**

**Second Respondent**

**MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES**

**Third Respondent**

---

**JUDGMENT DELIVERED ON 22 APRIL 2022**

---

**RALARALA AJ**

**INTRODUCTION**

[1] This matter comes before this court by way of review in terms of the provisions of Rule 53 of the Uniform Rules of Court. It is an application to review and set-aside a conviction and sentence imposed by the Paarl Magistrate Court on 04 August 2017, subsequent to a plea in terms of section 112(1) (a) of the Criminal

Procedure Act 51 of 1977 (*The CPA*). The first respondent is the Additional Magistrate, Paarl Magistrate Court. The Director of Public Prosecutions, Western Cape is the Second Respondent and the Third Respondent is the Minister of Justice and Correctional Services. The application is unopposed as all the respondents filed notices to abide. Thus no cost order is sought against the respondents.

[2] There was a delay in the launching of this application. In addition to the review application, the applicant also brought an application for condonation for the late filing of the review application. The applicant has given satisfactory reasons why condonation for the late filing of his application should be granted by this court. In my view, the condonation application must succeed.

## **FACTUAL BACKGROUND**

[3] The applicant then 31 years was arrested on 15 February 2017 on a charge of theft .The allegation levelled against him being that he stole car keys of Lizaan Geedt while at a night club. The complainant recovered her keys after enquiring from the applicant about them. The applicant explained that he had mistakenly taken her keys and had no intention whatsoever to steal same. The police were called which led to the arrest of the applicant. He was later released from police custody after he paid bail on 16 February 2017, and made an appearance in court on 17 February 2017. A Legal Aid attorney was appointed on his behalf. Legal Aid made presentations to the Senior Prosecutor but were unsuccessful. The matter was later enrolled for trial after a pre-trial was held. On 4 August 2017 the Senior Prosecutor approached the applicant in the absence of his legal representative and threatened him with imprisonment in the event that he pleaded not guilty. The Senior Prosecutor

managed to persuade the applicant to plead guilty and the matter was as a result transferred to another court for plea proceedings, without the knowledge of the applicant's legal representative. For the sake of completeness, the relevant parts of the record reflects the following:

**“Prosecutor: Ray Burt. He is terminating Legal Aid’s mandate, matter being transferred to C court. Ms Blaauw has endorsed the charge sheet he needs to appear in C Court today still.**

**Court: Okay. Sir your matter is now transferred to ‘C’ Court you must go there now.**

**Accused: Okay, sorry can I go Sir?**

**Court: yes, yes”**

**“Prosecutor: Can we send the charge sheet? Mr Johnson has taken the docket.**

**Court: Why?**

**Prosecutor: Because he wants to do it a 112(1) (a) and Legal Aid does not want to.”**

[4] According to the applicant, he never terminated the mandate of his legal representative as it was suggested by the Prosecutor in court. It is also evident from the court record that the applicant's legal representative was not in agreement with the manner the state intended to conduct the proceedings. The applicant subsequently made an appearance before another Magistrate in C-court. The plea proceedings commenced. The charge was put to the applicant and he pleaded guilty as suggested by the Senior Prosecutor and subsequent thereto, the Magistrate invoked the provisions of section 112 (1)(a) of the CPA. The applicant was accordingly convicted and sentenced to a fine of R3000, 00 or 3 months imprisonment which was suspended for a period of three years on condition that the applicant is not convicted of theft committed during the period of suspension.

[5] The transcribed record in respect of the plea proceedings was not available save for the pro forma record attached to the charge sheet with notes of the magistrates on the section 112(1) (a) plea proceedings. As already explained above, the Magistrate did not oppose the review application in this court and therefore made no statement or comments pertaining to the averments of the applicant in his application. The Senior Prosecutor as well did not negate or dispute the serious averments made by the applicant in his application. In the absence of any opposition or comments to the allegations made by the applicant, this application will therefore be considered only on the basis of the Applicant's papers.

## **ANALYSIS**

[6] Section 112(1) (a) of the Criminal Procedure Act entitles the court to enter a verdict of guilty on a mere plea of guilty without questioning or evidence. If the presiding officer is of the view that the offence does not merit punishment of imprisonment or any other form of detention without an option of a fine or a fine not exceeding the amount determined by the Minister from time to time by notice in the Gazette. The current position is that the fine should not exceed R5000 (GN R62 in GG 36111 of 30 January 2013). See **S v Tshabalala (102/2015) [2016] ZAFSHC 90 (5 May 2016)**.-

[7] It is unfortunate that the plea proceedings were initiated in a manner that undermines the administration of justice. The Applicant in his founding Affidavit stated as follows on how the Senior Prosecutor threatened him: ” ***you can beg and plead this girl now to drop the charges “ ...”I was also informed by Mr***

***Johnson that the complainant and her friend had been missing out on university and college which they were paying for, along with incurring the costs of petrol and their time was being wasted.” Mr Johnson then said to me you “you will see the inside of a jail cell” Indeed I begged the complainant to drop the charges and told her that I have a family to support. I am a breadwinner.....I just cannot go to jail.”***

[8] The actions of the Senior Prosecutor are a matter of grave concern in that he dispensed with the applicant’s right to legal representation when he caused the applicant to engage with the state witness in the absence of his legal representative. The right to legal representation is a fundamental right firmly established in section 35 (3) of the Constitution. Plasket J in *S v Lusu* 2005(2) SACR 538(E) para 11 expressed himself as follows:

***“The right to legal representation is a right central to the fairness of criminal trials. Kroon J, in S v Manguanyana 1996 (2) SACR 283 ( E) at 287 e, S v Melani and Others 1996(1)SACR 335 (E ) held that this right was ‘an integral part of our legal system and the ‘the cornerstone ‘of a civilized system of justice’. Section 35(3) (f) of the Constitution of the Republic of South Africa,1996 gives every accused person the right, as part of his or her right to a fair trial ,’to choose and be represented by a legal practitioner, and to be informed of his right promptly’ and section 35(3) (g) provides that he or she has the right to have a legal practitioner assigned to them by the State and at State’s expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”***

[9] The learned justice further stated at para 13 of the judgment:

***“The importance of the right to legal representation has been stressed many times by the courts here and elsewhere – often with reference to the well – known judgment of Black J in Gideon v Wainwright 372 US 335 (1963), S v Khanyile and Another 1988 (3) SA 795(N)”***

[10] Further, the acts of intimidation and threats of imprisonment directed to the applicant demonstrate improper behavior on the part of the Senior Prosecutor. The applicant states in his Founding affidavit that “ ***Mr Johnson advised that he should plead guilty to the charge against him .He informed the me that if I do not plead guilty and if I drag this matter out, he will make sure that I will go to jail.”***

[11] It is inconceivable that the Senior Prosecutor was not aware of the applicant’s defense, as the applicant’s legal representative had caused representations to be considered by the Senior Prosecutor prior to the matter being enrolled for trial. I might add that the applicant’s defense is the same as reflected in his warning statement and in the pre-trial minute which read as follows” **Denies stealing the item, had no intent.**” In my view, it was abundantly clear that the accused denied the allegations levelled against him. He intended to plead not guilty to the charge. He made it clear from the beginning that he had no intention whatsoever to steal the keys in question. This was made known to the senior prosecutor when the applicant made representations to him as well as from the pre-trial minute. The conduct of the senior prosecutor is reprehensible and must be deprecated as it has no place in a country based on human dignity, equality and freedom. Prosecutors are trained

professionals and should be relied upon not to allow matters to proceed under section 112(1) (a) when that is not appropriate. According to the Code for Members of the National Prosecuting Authority (“NPA”) under Section 22 (6) of the NPA Act 1998 it is recorded that ***‘Prosecutors must be individuals of integrity whose conduct is objective, honest and sincere. Prosecutors must respect, protect, and uphold justice, human dignity and fundamental rights as entrenched in the Constitution. They must strive to be and to be seen to be consistent, independent and impartial.’***

[12] The Prosecutor has a duty to obey the law and respect everyone’s constitutional rights. In my view, the conduct of the senior prosecutor in this matter fall short of the norms and values espoused in the Code for prosecutors. The Senior Prosecutor was so intent to secure a conviction to an extent that he abdicated his constitutional duty to ensure that justice is not only done but seen to be done. This type of conduct by court officials should be discouraged. In ***S v Macrae 2014 (2) SACR 215 (SCA) at 225 f-h*** Jones JA, had this to say ***“It needs to be stressed once again that the duty of Prosecutors is not to secure a conviction at all costs or defend convictions once obtained. Their duty is to see that so far as possible justice is done.”*** Meanwhile in ***S v Fani and Others 1994 (1) SACR 636(E) at 638 e-f*** the court said: ***“The object of criminal proceedings in our law has never been to secure a conviction at all costs. The duty of the prosecutor is to present all facts in an objective and fair manner so as to place the court in a position to arrive at the truth.”*** See also ***Maliga v S 2015 (2) SACR 202 (SCA)***. The applicant suffered an injustice in the hands of the Prosecutor and the Magistrates and should have been avoided.

[13] More importantly. I find it highly concerning that the Magistrate was satisfied by the Prosecutor's submission that Legal Aid's mandate had been terminated without confirming same with the accused, or requiring the legal representative to withdraw as attorney of record in an open court. In my view, the Magistrate should have interrogated the applicant's appearance without his legal representative as the record reflected that Mr Sauls from Legal Aid represented the applicant on previous court appearances and there was no indication on record that he had at any stage withdrawn as attorney of record. Instead, the plea proceedings commenced and the matter was finalized notwithstanding that Legal Aid was on record for the applicant. The sloppy and lackadaisical conduct of the Magistrate in this matter is highly objectionable and must be discouraged. Presiding officers must perform all assigned judicial duties diligently and must investigate matters appearing before them thoroughly in line with the Code of Conduct for judicial officers.

[14] From the totality of all the evidence placed before me, I am of the view that the proceedings in the court below are tainted with gross irregularity which calls for an intervention by this court. I am satisfied that a proper case has been made for review of the plea proceedings of the court below.

[15] I'm further of the view that there will be no prejudice in the administration of justice having regard to the provisions of sec 324 of the CPA which reads as follows

:

**“Whenever a conviction and sentence are set aside by the court of appeal on the ground –**

**(a) .....**



(b) .....

(c) That there has been any other technical irregularity or defect in the procedure, proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted after either on the original charge, suitably amended where necessary ,or upon any other charge as if the accused has not previously been arraigned ,tried and convicted....”

## **ORDER**

[16] In the result, I propose the following order:

16.1 The delay in launching the application is hereby condoned.

16.2 The conviction and sentence by the first respondent on 04 August 2017 is hereby reviewed and set aside .

16.3 No order as to costs

---

**RALARALA AJ  
ACTING JUDGE OF THE HIGH COURT**

**I agree and it is so ordered:**

---

**ERASMUS J  
JUDGE OF THE HIGH COURT**

**COUNSEL FOR APPLICANT: ADVOCATE B PRINSLOO**

**MILTON DE LA HARPE ATTORNEYS**

**COUNSEL FOR RESPONDENTS: NOTICE TO ABIDE**