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

HIGH COURT REF NO: 221/2023
REVIEW CASE NO.:23/923/2022
MAGISTRATE'S SERIAL NO.: 29/2023

In the matters between:

THE STATE

v

MTHUNZI NDZISHE **Accused**

And

HIGH COURT REF NO: 222/2023
REVIEW CASE NO.: 23/362/202343/2020
MAGISTRATE'S SERIAL NO.: 31/2023

THE STATE

v

WILLIAM FISHER **Accused**

JUDGMENT DELIVERED: 20 JULY 2023

LEKHULENI J *et* NZIWENI J

Introduction

[1] There are two separate cases before us, that were submitted for automatic review by the Magistrate of Cape Town, in terms of section 303, of the Criminal Procedure Act 51 of 1977 ("the CPA"). The relevant cases are *S v Mthunzi Ndzishe*

and *S v William Fisher*. Both cases were presided over by the same magistrate, and involved similar charges and issues. For brevity, we will set out the factual background of each case and then deal with the issues raised in these cases concurrently.

[2] In both cases, the accused were facing a charge of possession of drugs in contravention of section 4(b) read with sections 1, 13, 17, 18, 21 to 25, and 64, read with Schedule 2, Part 2 of the Drugs and Drug Trafficking Act, 140 of 1992 (Possession or use of dangerous dependence-producing substances). In respect of S v *Mthunzi Ndzishe,* it was alleged that on 24 December 2022, and at Strand Street in the district of Cape Town, the accused did wrongfully have in his possession to wit:
9 methaqualone tablets, also known as Mandrax;

3 packets of methamphetamine also known as Tik;
1 Tik Lolly (methamphetamine residue).

[3] Meanwhile, in *S v William Fisher,* the State alleged that on 17 May 2023, and at Aspeling Street, in the district of Cape Town, the accused did wrongfully have in his possession to wit:
22 packets of cocaine;
8 packets of dagga; and

½ tablet of mandrax.

[4] In both cases, the charges were put to the accused, and they pleaded guilty to the charge. The court then invoked the provisions of section 112(1) (b) of the CPA. After questioning the accused in terms of section 112 (1) (b) of the CPA, the magistrate

returned a guilty verdict on the above-mentioned count. The accused were subsequently found guilty on the strength of their guilty pleas.

[5] After careful consideration of the two records, it was clear that the affidavit [forensic report] in terms of s 212 (4) (a) and (8) (a) of the CPA, which is supposed to establish the identity of the substances; was not considered during both plea proceedings. Additionally, it became quite discernible from the record that the questioning by the magistrate did not delve into the accused's knowledge and understanding of the technicalities or the scientific essential elements of the crimes they were facing.

[6] We got the distinct impression that the court did not, upon questioning both accused, establish if there were factual basis for the technical admissions made by the accused. Consequently, the sufficiency of the evidence to uphold the guilty verdicts was immediately called into question.

[7] Because of clear evidential problems concerning both cases, we did not deem it necessary to direct queries first to the learned magistrate in terms of section 304(2)(a) of the CPA.

[8] To consider whether the provisions of section 112(1)(*b*) of the CPA were properly applied, it is necessary to quote from the record on how the trial court conducted the questioning of the accused in both cases.

[9] In *S v Mthunzi Ndzishe,* the questioning by the court in terms of section 112(1)(b) reveals the following:

"Q. . . Where were you on 24/12/2022 that brings you to court today?

A I was in Strand Street by the steps as you going up to Top Deck. We were 3. A police van came stopped in front of us and searched us, x 9 tablets, x 3 bankies (sic) of tik were found on me.

Q Exactly where on your person were the drugs?

A I was wearing a tight underneath my pants, drugs found there.

Q Did you give the police authorisation to search you Sir?

A Yes your worship

Q You confirm the drugs were:

9 x Mandrax containing methaqualone?

A Yes

Q 3 *bankies* (sic) of tik containing methamphetamine

A Correct

Q 1 x tik *lollie* (sic) with methamphetamine residue?

A Yes your worship

Q What were you going to do with these things so (sic)?

A I was smoking tik since 2002, since I started staying on the streets being using tik and mandrax.

[10] While the court's questioning of *William Fisher* was as follows:

[11] "Q … Where were you on 17 May 2023 that brings you to court today?

A Aspelling Street District 6, I was walking, Law Enforcement were travelling in a bakkie. They stopped me and searched me, they get (sic) in a sliver box these drugs, like a pencil box, silver in colour, in my right side of my tracksuit pants.

Q In this silver pencil case there were:

A x 22 bankies of cocaine (cocoa leave extract)

A Yes

Q x 8 bankies of dagga?

A Correct Mam.

Q ½ tablet mandrax containing methaqualone?

A Correct

Q How do you know dagga, cocaine, madrax?

A I use them as drugs for more than 2 years.

Q So you were going to smoke the drugs

A Yes, Mam . . .”

Evaluation

[12] It is not clear how the accused could conclude that what was found in their possession were indeed the drugs at issue. The fact that an accused person confirms the identity of the drugs or that he used them as drugs means nothing if there are no further attributes or indicators that are sufficient to establish the identity of the substance at issue. It cannot thus be assumed that the accused possessed a technical understanding of the substances found on them.

[13] Given the above questions and answers, there is simply no proof that the accused, by reasons of their use experience, were cognisant of and uniquely capable of determining that what they had in their possession were indeed undesirable-dependence producing substances.

[14] In these two matters, because of the nature of the admissions of the accused, there is no evidence or reasonable inference to justify that what was found upon the accused had the necessary features or indicators of the particular substances mentioned in the charge sheet. After all, the accused did not even lay a foundation as to why they stated that they were in possession of undesirable substances.

[15] Essentially, the accused's admission should reveal his or her knowledge of the properties of the substance through past experience and his or her current observation of the substance at issue that led him to conclude that the substance is indeed the substance at issue.

[16] As far as the admissions made by the accused are concerned, they are quite sparse to establish beyond reasonable doubt that the various substances found in their possession were, as the prosecution claimed, undesirable dependence-producing substances. Plainly, the above answers proffered by the accused contained merely the bare-bones of what is required to be proven by the prosecution. This missing crucial fact [that the material the accused possessed was undesirable substances as described in the charge sheet] is necessary to prove for the conviction of the accused. Therefore, it is clear that neither of these admissions satisfy the elements of the offence. In the circumstances, it is difficult for this Court to safely assume the fact.

[17] As is clear from the case-law, that greatest care must be taken to ensure that the admission made by an accused person is not a product of ignorance, but that the

accused fully understands the meaning and the effects of the admissions he/she is making.

[18] Although the issue in these matters did not really involve a forensic report, we still find it necessary to mention that; if the forensic reports were admitted, they would have left no room for doubt that the various substances found in the possession of the accused were, as the prosecution claimed, undesirable dependence-producing substances.

[19] Significantly, we find it very concerning that despite previous cases from this division addressing this issue, magistrates, in particular from Cape Town Magistrates Court, continue to neglect this aspect of the law. See *S v Ashwin Elmie* (143/21; 16/2021) [2021] ZAWCHC 188 (11 May 2021). Recently, in *S v Paulse* 2022 (2) SACR 451 (WCC) para 11, a case that also emanates from Cape Town Magistrate Court, Henney J, after reviewing several cases dealing with admissions by an accused of facts falling outside of his personal knowledge, stated that it is clear from the authorities that where an accused pleads guilty to a charge where one of the elements of the crime can only be proven by scientific means, the court must request the prosecutor to hand up the analysis certificate. The learned justice went on to say that there may well be cases where a court may convict a person without the production of such certificate, if from the questioning of an accused and subsequent admissions made, the court can come to such a conclusion.

[20] Similar sentiments were echoed by Nziweni J, (with Lekhuleni J concurring), in *S v Nazeem Bassadien,* unreported case number:178/2022 (16 September 2022), where the following was stated:

> "[14] (t)his is not to say that forensic report is the only way to prove composition of seized material. I say this quite mindful of the fact that there may also be alternative ways to prove substance composition; other than through forensic evidence. Thus, the aforegoing, in no way alters the other type of evidence (including testimony of a police official or an accused person regarding their knowledge of substance) that may be sufficient to sustain a conviction. See, S *v Elmie* (143/21; 16/2021) [2021] ZAWCHC 188 (11 May 2021), at paragraph 16.
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> [15] I think once again clarity needs to be afforded in this area. The point of admitting a forensic report into evidence during plea proceedings provides amongst others, prima facie evidence of the substance's composition, net weight and the truth about the allegation made by the state that, the material which was found in possession of an accused person and was seized by the police, was undesirable dependence-producing substance; as claimed in the charge sheet. It is meant to guard against the risk of false conviction.
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> [16] As such, it is not surprising that a forensic report even in plea proceedings plays a decisive role, particularly if an accused person is unrepresented. All these are part of the protections for the unrepresented accused. Thus, the Court is not *per s*e being overly rigid."

[21] We are of the view that, in this case, the trial court did not have enough information for it to conclude that the accused in both cases were in possession of dependence producing substance.

[22] Lastly, we have also noted that in *S v Mthunzi Ndzitshe,* when the accused made his first appearance in court on 22 December 2022, the accused elected to engage the services of Legal Aid after his rights to legal representation were explained to him. On that day, Legal Aid came on record for the accused. The matter was

postponed to 6 January 2023 for bail information. On 6 January 2023, Legal Aid was absent, and the case was postponed to 11 January 2023 for Legal Aid. On 11 January 2023, the Legal Aid attorney was in attendance. The attorney informed the court that the accused was abandoning his bail application, and the case was by agreement, postponed to 25 May 2023 for further investigation.

[23] On 25 May 2023, when the matter resumed, the court once more explained the accused's rights to Legal representation, notwithstanding the fact that Legal Aid was already on record. Nothing from the record indicates why the Legal Aid Attorney was absent on 25 May 2023 despite the fact that the matter was postponed by agreement. Furthermore, there is no evidence on record suggesting that Legal Aid had withdrawn from representing the accused, and neither did the accused inform the court that he withdrew his mandate for Legal Aid to represent him. For all intents and purposes, Legal Aid was still on record when the trial of the accused was heard and finalised.

[24] In our view, the fact that the accused elected Legal Aid to represent him had to be respected. The reason for the presiding officer's second explanation of the accused's right to legal representation is unclear, especially since Legal Aid was on record and had already appeared on behalf of the accused twice in the previous court sittings. Importantly, when the case was postponed on 11 January 2023 to the 25 May 2023, Legal Aid was in attendance and informed the court that the accused was abandoning his bail application. Pursuant to the court's second explanation, the accused elected to conduct his own defence.

[25] In *S v May* 2005 (2) SACR 331 (SCA) para 6, the Supreme Court of Appeal observed that it is incumbent on the person presiding over a criminal trial to ensure that the accused is fully informed, in open court, not only of the right to legal representation but also of the consequences of not having a lawyer to assist in the defence. The court noted further that the application of the rule regarding legal representation is context-sensitive. In any given situation, the inquiry is always whether an accused's fair trial right has been infringed. See *Shiburi v The State* (205/2017) [2018] ZASCA 107 (29 August 2018) at para 13.

[26] In our view, it was irregular to proceed with the trial against the accused in the absence of Legal Aid, despite the fact that Legal Aid was still on record representing him. Pursuant to the findings we made hereinabove, we are of the view that the accused was prejudiced, and the irregularity infringed his right to a fair trial. As discussed above, the presiding officer failed to question the accused adequately to ensure that all the elements of the charge levelled against the accused were properly established. Crucially, it cannot be said in this case that the accused represented himself adequately throughout the trial.

[27] In the circumstances, the conviction and sentence in both cases cannot stand.

Conclusion

[28] In view of these considerations, we cannot confirm that the conviction and sentence of the accused in both cases were in accordance with justice. The irregularities observed in this cases, in particular, relate to a failure to comply with

section 112(1)(b) of the CPA, and therefore, the matter should ordinarily be remitted to the court *a quo* in terms of section 312 of the CPA. However, we are mindful of the guidance of the Supreme Court of Appeal in *S v Mshengu* 2009 (2) SACR 216 (SCA), where the court observed that section 312 should not be invoked if compliance with the section would be unfair. To this end, we find the following excerpt from that judgment apposite. The court stated:

> "[17] The purpose of s 312 is to prevent an injustice which may occur if an accused person were to escape punishment for his or her crime only because his or her conviction was set aside on the ground that there was a failure to comply with s 112 of the Act. *But an injustice cannot occur where the accused has served the entire sentence by the time the conviction is set aside on appeal.* Nor can it occur where a fresh conviction cannot be achieved following a remittal to the trial court…. *There can be no justification for ordering that an accused person, who has already served the entire punishment, be subjected to a second trial. Such an order would be inconsistent with the right to a fair trial.* In my view it could never have been the intention of the legislature that a court is obliged to comply with the section irrespective of the injustice or unfairness that it may cause." (our emphasis)

[29] The charges involved in both cases are serious. It is also important to remind ourselves at this stage that it would certainly be a failure of justice if both accused could escape because of mere technicalities. The circumstances of these cases evince that the accused would not be prejudiced, and justice would be achieved if the proceedings are again instituted against the accused.

[30] In the result, the following order is granted:

(a) The convictions and sentences in respect of both proceedings, are set aside.

(b) In terms of section 312 of the CPA, the matters are remitted back to the same magistrate to allow the accused to plead afresh, so that the accused can be sufficiently questioned.

(c) Should the accused still plead guilty and be convicted; in sentencing the court should consider the time already spent by the accused in custody serving sentences. The court may also consider to *ante* date the sentences.

(d) The State should make sure that the matters are dealt with promptly.

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LEKHULENI JD
JUDGE OF THE HIGH COURT

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NZIWENI CN
JUDGE OF THE HIGH COURT