



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

Case No.: 2855/2023

In the matter between:

JOSQUIN SEPTEMBER

Applicant

and

THE ADDITIONAL MAGISTRATE

First Respondent

FOR THE DISTRICT OF PAARL

THE DPP, WESTERN CAPE, CAPE TOWN

Second Respondent

Date of Judgment: 2 October 2023 (to be delivered via email)

JUDGMENT

Henney, J

Introduction

[1] This matter comes before this court by way of a review in terms of the provisions of Rule 53 of the Uniform Rules of Court, particularly on one of the grounds of review, as set out in section 22(1) of the Superior Courts Act 10 of 2013¹.The

¹ 22 Grounds for review of proceedings of Magistrates' Court

application is to review and set aside a conviction and sentence imposed by the Paarl Magistrates' Court on 27 July 2022. The matter is unopposed by the Magistrate, as well as the Director of Public Prosecutions: Western Cape. The Director of Public Prosecution filed a notice to abide with the decision of this court.

Condonation:

[2] An application for condonation for the late filing of this application was lodged by the applicant, together with an affidavit in support thereof. The reasons are fully set out therein, which I find satisfactory and the application for condonation is hereby granted.

The Grounds for review:

[3] According to the applicant, the Magistrate committed a gross irregularity by failing to explain his right to legal representation before he was asked to plead to the charge.

The facts underpinning this application:

[4] The applicant was arrested on 26 July 2022 at Dischem Pharmacy, Paarl Mall on a charge of theft of a pack of Erect Capsules to the value of R109.95 from Dischem Pharmacy. During the proceedings before the Magistrate on 27 July 2022, the prosecutor suggested that the court should apply the provisions of section 112(1)(a) of the Criminal Procedure Act 51 of 1977("the CPA") in dealing with this matter.

[5] The Magistrate proceeded to deal with this matter in terms of the provisions of section 112 (1) (a) of the CPA. The applicant subsequently pleaded guilty to the charge of theft and the Magistrate sentenced him to a fine of R1000 or Fifty (50) days imprisonment.

(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-

(a) Absence of jurisdiction on the part of the court;

(b) Interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) Gross irregularity in the proceedings; and

(d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

[6] Prior to recording the plea of the applicant, the Magistrate stated the following to the applicant as digitally recorded on the transcribed record:

'COURT: Okay, sir the state indicated if you intend to plead guilty today, this matter can be disposed of and we will follow a short procedure, but then you will have to do it in person. If you intend to plead not guilty, however, which you are totally entitled to do, this matter will have to be postponed for trial, and everything will be explained to you further.'

[7] On the handwritten version of the proceedings, as recorded by the Magistrate, the following is stated:

[8] *'Acc. rights with regard to legal representation explained -he understands- conducts own defence + wants to plead guilty today.'*

[9] The handwritten version is clearly at variance with the transcribed version as recorded by the Magistrate, which reflects not only that the applicant's right to legal representation was explained, but that he elected to proceed in person.

Discussion:

[10] According to the applicant the mechanical recording is a true reflection of what had transpired on the day of the said proceedings. He followed the Magistrate's advice, who decided on the so-called 'short procedure' and he decided that he would proceed without any legal representation. He was never given an opportunity to address the Magistrate, except to address the court in mitigation of sentence. If the matter had been dealt with in terms of section 112(1) (b) of the CPA, the Magistrate would have realised that the applicant had a defence against the allegations against him. The applicant was not aware that following the 'short procedure' would result in him having a criminal record.

[11] It is apparent from the mechanical recording that was a contemporaneous account of the record, that the applicant's right to legal representation was not explained. It is well established that the failure to inform an accused of his or her right to legal representation amounts to a gross irregularity that impacts on the applicant's right to a fair trial as provided for in section 35 of the Constitution.

[12] In the Commentary on the Criminal Procedure Act² the following is said regarding the court's function when explaining an accused right to legal representation:

'[T]he following principles [has been] established in our case law:

- a. The record must indicate precisely what was conveyed to the accused and what her responses were. See S v Sibiya 2004 (2) SACR 82 (W) 90b–c; S v Sikhipha 2006 (2) SACR 439 (SCA) at [9]–[10].*
- b. A court should encourage an accused to make use of legal aid where the charge is a serious one. See S v Mofokeng 2013 (1) SACR 143 (FB) at [17.10].*
- c. A court must be satisfied that an accused's choice to conduct her own case is an informed one. See S v Solomons 2004 (1) SACR 137 (C) at 141e–f.'*

[13] A further concern which is evident from the record is that the Magistrate, after the prosecutor suggested that the proceedings could be dealt with in terms of the provisions of section 112 (1) (a) of the CPA, explained to the applicant that this matter can be disposed of by means of the so-called 'short procedure', but in order for this to happen the applicant had to proceed without legal representation. This was an improper, and an erroneous explanation and understanding of the provisions of section 112 (1) (a) based on the following: Firstly, the application of the provisions of section 112 (1) (a) implies that the application of section 112(1) (a) depends on whether the accused elects to conduct the proceedings with or without legal representation. Secondly, the provisions of section 112 (1) (a) will only apply in cases where the accused wants to proceed without legal representation, and that a case can only be dealt with in terms of these provisions if the accused is not legally represented. Thirdly, that in cases where an accused is not legally represented a court does not have a discretion to apply the provisions of section 112(1) (a).

[14] In *S v Gumede and Others*³ Olsen J stated the following (at [41.b] and [41.c], emphasis added) regarding a court's discretion in applying the provision of section 112(1)(a) of the CPA:

² Du Toit, De Jager, Paizes, Skeen and Van Der Merwe RS 66 -2021 : Ch 11 - page 19

³ 2020 (1) SACR 644 (KZP)

'(a)...

(b) The discretion must be exercised judicially.

(c) In exercising that discretion, the magistrate must recognise that the advantage sought to be gained by the employment of s 112(1)(a) is one of efficiency. That, however, must be weighed against the fact that an important component of the right to a fair criminal trial is the achievement of an adequate assurance that innocent people are not wrongly convicted, bearing in mind that protection against a wrong conviction is no less important in the case of a minor offence.'

[15] This is a very important provision of the criminal justice system that can be used to weed out and dispose of cases rather than to question an accused in terms of the provisions of section under 112 (1) (b) or having to deal with a costly and time consuming trial for less serious offences.

[16] If utilized and applied correctly it can be an indispensable tool to decrease the case load of an already overburdened and congested criminal justice system, especially in the Magistrates Court. The indiscriminate use of this provision should, however, not undermine the right to a fair trial of an accused person in terms of the provisions of section 35 of the Constitution. By applying this section, the presiding officer should be mindful that a few very important fair trial rights, as guaranteed in the Constitution are waived by an accused person in exchange for a very light sentence. Thus, there should not be a misapplication of the provisions of this section by omitting to explain to an accused person his or her right to legal representation, in order to finalise cases in haste. There should not be an over-eagerness to finalize cases at the cost of infringing on an accused right to a fair trial, especially an accused right to legal representation.

[17] For all of these reasons I am inclined to agree with the applicant that there was a gross irregularity in the proceedings in the Magistrates' Court which lead to the conviction and sentence imposed on the applicant.

[18] In the result I would make the following order:

- 18.1) that the conviction of the applicant in terms of section 112 (1) (a) of the Criminal Procedure Act 51 of 1977 in respect of a charge of Theft, and sentence subsequently imposed on the applicant in respect thereof at the Magistrates Court Paarl on 27th July 2022, under case number A928/2022 is reviewed and set aside;
- 18.2) that the particulars relating to the conviction and sentence under CAS469/07/2022 with FP Number 2022 XYZ 659 of the applicant be removed from the Register of Previous Convictions, by the Criminal Record Centre: South African Police Services in Pretoria;
- 18.3) the Director of Public Prosecutions or a prosecutor so mandated may institute proceedings afresh against the applicant if they are desirous to do so;
- 18.4) No order is made as to costs.

R.C.A. Henney

Judge of the High Court

I agree, it is so ordered.

A. Le Grange

Acting Deputy Judge President
of the High Court