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

[REPORTABLE]
HIGH COURT REF NO: 269/22
MAGISTRATE'S SERIAL NUMBER: 39/2022
HIGH COURT REVIEW CASE NO: 14 /884/2021

In the matters between:

THE STATE

And

ROYSTON BERGMAN

HIGH COURT REF NO: 343/22
MAGISTRATE'S SERIAL NUMBER: 06/22
HIGH COURT REVIEW CASE NO: T1715/2018

THE STATE

And

MPHO MATUME

JUDGMENT

RALARALA AJ:

INTRODUCTION

[1] The two matters were brought before me by way of review in terms of section 304 of the Criminal Procedure Act 51 of 1977 ('CPA'). Both matters were dealt with by magistrates in the Cape Town and Athlone Magistrates Courts respectively. The accused were unrepresented and in both cases they pleaded guilty to the charges of robbery and contravention of section 65(2) (a) of the National Road Traffic Act 93 of 1996 ("NRTA"), respectively. The Guilty pleas prompted the application of the provisions of section 112(1) (b) of the CPA. The accused were convicted and sentenced based exclusively on their guilty pleas.

[2] When both matters came before me, I was not satisfied that the proceedings were in accordance with justice. Consequently, in both matters the convictions and the sentences were set aside. I then ordered the immediate release of both accused. In S v Bergman, I directed certain questions to the magistrate.

[3] In light of the similar manner in which the presiding magistrates dealt with these matters, I decided to consider them together. This court is essentially enjoined to consider whether the proceedings before the respective magistrates appear to be in accordance with justice and equity.

BACKGROUND

S v Bergman

[4] In this particular case, after the questions and conviction of the accused by the Presiding Magistrate, Bergman was sentenced to a period of 12 months' imprisonment.

[5] In his plea, the accused admitted the following:

- that he grabbed the complainant's cellphone;
- the complainant resisted;
- a scuffle ensued between them;

- a security guard intervened and the cellphone was recovered and returned to the complainant.

[6] Importantly, the above information satisfied the court a quo that the accused admitted the elements of the offence of robbery. The relevant parts of the plea proceedings reveal the following:

> *"Q in your own words can you tell Court it (sic)*
> *I saw young sitting with this phone in his hand (sic). I walk past him. I return – on my return I grab his cellphone. We tostile (sic) – He pushed me on the ground and I had still in my hand hit Iphone (sic) on his head. Both of us fell on the ground –security came. He told them what happened. Security kept me until the police arrived and was arrested.*
> *The phone was given back to the victim*
> *Public Prosecutor: State Fact (sic)*
> *Confirmed own xxx with accused.*
> *Public Prosecutor: SAP 69 –hand court 13 –charge sheet –Exhibit "A"*
> *FINDING*
> *The court is satisfied that the accused is guilty of the offence to which he has pleaded."*

[7] A close examination of the plea proceedings reveals that the questioning did not establish all the elements of the offence of robbery. Clearly, the elements of unlawfulness and intention were not covered by the admissions made by the accused.

[8] As mentioned above, on 6 September 2022, I then directed the following query to the magistrate:

> *"Kindly explain whether the Presiding Officer in this instance was satisfied that the elements of unlawfulness and intent in particular were sufficiently admitted by the accused?"*

On 02 November 2022, in his delayed response, the magistrate conceded that he had erred in questioning the accused. The following are the relevant parts of his response:

> *"After questioning the Accused, the Court, in error, was satisfied that the Accused has admitted all elements to the charge.*
> *Upon receipt of the record, which was received by me on the 20 October 2022, post facto, I am not satisfied that the elements of unlawfulness and intent were sufficiently canvassed by the Court and admitted by the Accused.*
>
> *I submit that it was a regrettable oversight on my part and request for your indulgence."*

[9] In my mind, the concession made by the magistrate was correctly made.

S v Matume

[10] In this instance, the accused, a 42 male inter alia, admitted that:

- he was arrested at a road block on Govan Mbeki Road, a public road in the Wynberg district, for driving a motor vehicle with registration number CY [. . .] whilst the concentration of alcohol in any specimen of his blood was not less than 0,0 5 grams per 100 ml;
- he drank five to six beers at a work related party;
- the alcohol content in his blood had been determined to be 0.15 grams per 100 ml.
- Blood was drawn within two hours.

[11] However, upon further questioning by the Presiding Magistrate, the accused indicated that he had no knowledge that driving a motor vehicle on a public road while the alcohol content in his blood stream was not less 0.05 gram per 100 ml was

a criminal offence. For the sake of completeness, I will recite the relevant parts of the record:

> *"Court: Did you know that it is an offence Mr Matume, to drive a motor vehicle on a public road while the concentration of alcohol in your blood is not less than 0.05 grams per 100 millilitres of blood?*
> *Accused: I did not know that, Your Worship.*
> *Court: What do you know?*
> *Accused: What I thought your Worship, one gets arrested when you drive and busy drinking with a beer in your hand, Your Worship.*
> *Court: Ms Gangat?*
> *Prosecutor: Yes Your Worship. Ignorance of the law is not a defence, Your Worship.*
> *Court: Okay*
> *Prosecutor: The accused … [intervenes]*
> *Court: That is your answer.*
> *Prosecutor: … even though he did not know, it is still an offence and he ought to have known, Your Worship.*
> *Court: Okay I wanted you to say. Okay. Mr Matume … [intervenes]*
> *Accused: Yes, Sir*
> *Court: You are saying the only thing that you knew was that you, is that according to your knowledge is that you cannot drink whilst you are driving?*
> *Accused: To be honest, yes, Your Worship.*
> *Court: What do you think about driving a vehicle whist you have had some drinks?*
> *Accused: I will not really know, Your Worship, because I will not know, Your Worship, how a person feels, Your Worship, driving after …[indistinct], Your Worship. Because I drive normally, Your Worship, even after I had something to drink, Your Worship."*

[12] Subsequent to the above questioning, the magistrate proceeded to convict the accused and sentenced the accused to a period of 18 months' imprisonment or a fine of R6000,00 half of which was suspended for five years, on condition that the accused is not convicted of contravening section 65(2) (a) and section 65(1)(a) of

NRTA. The accused was disqualified from obtaining a learner's licence within the next 6 months. I should further point out that, the accused was driving without being in possession of a driver's licence, although that was the case the state did not charge him in that regard.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

[13] Plea proceedings are by their very nature different from trial proceedings in that the questioning is designed to determine whether the accused admits all of the allegations in the charge sheet to which he pleaded guilty. The purpose of the plea proceedings in terms of section 112(1) (b) of the CPA is primarily to protect the undefended and uneducated accused as in the instant cases. Particularly, in Mr. Matume's case the court below was informed that his highest level of education is grade 6. In *S v M* 1982(1) SA 242 D –E Didcott J observed that:

> "*Accused persons sometimes plead guilty to charges, experience shows, without understanding fully what these encompass. The danger of their doing so is obvious in a society like ours, which sees many who are illiterate and unsophisticated coming before the courts with no legal assistance* …".

See also *S v Samuels* 2016(2) SACR 298 (WCC) para 21. It follows that the questioning and answers must cover all the elements of the offence that the state would ordinarily be required to prove had the accused not proffered a guilty plea. In this manner, the court will be in a position to determine whether the accused person is indeed guilty and whether a conviction is justified.

[14] Back to the matter of S v Bergman, the presiding magistrate in this matter, clearly did not grasp that the questioning was not adequate to establish the existence of all the elements of the offence of robbery. I must emphasize that it should appear prominently from the accused person's answers that he had the intention to commit robbery, which means that he intended to steal the victim's property while using force. The essential elements of robbery are theft, violence, submission and intention. Embedded in the element of theft is the intention to deprive the owner permanently of his property and making it his own. Thus where

force was used to take one's property with the aim of borrowing the said property rather than to deprive the owner thereof permanently, it cannot be said that theft was committed and thus no robbery. See *Jonathan Burchell's Criminal Law Fourth Edition* page 707.

[15] The magistrate had a duty to establish the intention of the accused in respect of the appropriation of the cellphone in order to ensure that the element of theft was fulfilled. In *casu,* the presiding magistrate did not enquire about the state of mind of the accused person to determine *mens rea* at the time of the commission of the offence. Most importantly, it should be borne in mind that the admissions made by an unrepresented accused do not absolve the court of the obligation to satisfy herself or himself of the accused's guilt. *S v Adams en Tien Ander Soortgelyke Sake* 1986 (3) SA 733 (C)

[16] As a result of the inadequate and insufficient questioning, which contributed to the non-compliance with section 112, the provisions of section 113 of the CPA should have been invoked. *Mudau v S* [2015] JOL 33536 (SCA). There is therefore an inescapable obligation on the presiding magistrate to determine whether the accused person admits all the allegations in the charge sheet to satisfy her or himself that the accused is indeed guilty. *S v Witbooi* 1978 (3) SA 590 (T) at 594 - 595; *Mkhize v S* and another 1981 (3) SA 585 (N) at 586 H -587A. A conviction should not have followed in the circumstances that played out at the end of the questioning, instead more questions from the magistrate should have followed. This would be expected if the magistrate had full appreciation of the definition and the elements of the particular offence. This is a clear indication that particular attention need to be given to the elements of the specific offences when magistrates consider plea proceedings, especially where undefended accused persons are involved. It should be emphasized that when considering plea proceedings magistrates need to be meticulous throughout, and that should be abundantly clear throughout the record of proceedings. In order circumvent injustice to the accused persons, plea proceedings should not be rushed. In my view with the necessary appreciation of the offence more questions ought to have been asked in order to cover all the elements of the offence or a plea of not guilty ought to have been noted in terms of section 113 of the CPA.

[17] Turning back to the Matume case. The record of this case clearly reveals that, the court granted the prosecutor an opportunity to address the court following the accused's indication of not having knowledge that the conduct he was charged with and had pleaded to was an offence. Following that, the court proceeded with the questioning in a manner similar to cross examination, and when it appeared that the accused maintained his stance, the court proceeded with conviction. Unlawfulness as an element of the offence was not established in these plea proceedings, and what was established was sufficient to show that he offered a defense. In that case, the court should have been skeptical of the accused's guilt.

[18] I cannot emphasize enough how important it is for the presiding magistrate to always guard against an unjustified guilty plea. It must be borne in mind that the questioning is directed at what the accused person alleges rather than the truth of those allegations. It is for this reason that the questioning cannot assume the nature of trial proceedings. If during the questioning, it becomes apparent that a defence or a justification is advanced by the accused person a plea of not guilty must be noted as envisaged in section 113 of the CPA. See *S v W en Andere 1*999 (2) SACR 640 (C).

[19] Regrettably, instead of invoking the provisions of section 113 of the CPA, the presiding magistrate proceeded to question the accused person. According to the questions, the accused did not admit that his conduct was unlawful and that induced a sense of uncertainty on the part of the presiding magistrate as to the next step to be taken. This manifests itself in the magistrate allowing the prosecutor to address the court rather than making a decision that only a court can make in the circumstances. As already indicated, a not guilty plea would be appropriate in these circumstances.

[20] A distinctive anomaly in the sentence that cannot be overlooked, is that although the period of suspension and the offences that he should not be convicted of have been specified by the sentencing court, the sentence does not stipulate that these offences are not to be committed during the period of suspension. *Section 297 (1)(b) of the CPA* provides for suspension of sentences and stipulates the following:

"Where a court convicts a person of any offence other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion- . . .

(b) pass sentence but order the operation of the whole or part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph(a)(i) which the court may specify in the order; or

(c)…."

In my view the sentence is not a competent sentence, in that the condition is not clear nor precisely formulated as it does not specify in relation to what period is the accused precluded from committing the specified offences. The primary object is after all that the accused must understand what he or she has to do or avoid and for what length of period. *Hiemstra's Criminal Procedure Issue 11 28-81.* In my view the sentence imposed by the magistrate is incongruous to the provisions of section 297(1).

[21] It is apparent on the record of both matters that the magistrates did not adhere to the constitutional requirement of fairness when considering the plea proceedings. See section 35 (3) of the Constitution.

[22] It is for the above reasons that the convictions and sentences in both cases were set aside and this Court ordered the immediate release from prison of both accused.

N RALARALA
ACTING JUDGE WESTERN CAPE HIGH COURT

I concur

C.N. NZIWENI
JUDGE OF THE WESTERN CAPE HIGH COURT