

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – MAKHANDA]**

CASE NO.: B34/23

REVIEW NO.: 1/2023

In the matter between:

THE STATE

and

SALISWA ADAM

REVIEW JUDGMENT

NORMAN J:

[1] The accused, Ms Saliswa Adam, was arraigned before the Magistrate sitting in Alexandria on a charge of assault common. The State alleged that on 4 November 2022, at Marselle Location in the district of Barthurst, she unlawfully and intentionally assaulted Ms Linomtha Bityana by hitting her with an open hand on her head. She was not legally represented. She pleaded guilty to the charge and was convicted on her plea.

[2] She was sentenced summarily to undergo six (6) months imprisonment or to pay a fine of R1 200.00, which was wholly suspended for three years on condition that she was not convicted of assault committed during the period of suspension.

The issue

- [3] The matter was submitted to this Court for review in terms of section 302(1)(a) of the Act, on two bases, namely, that the accused was not legally represented and that the Magistrate who imposed the sentence had not held the substantive rank of Magistrate for seven (7) years and thus had exceeded the period of three (3) months imprisonment in respect of the sentence he imposed.

Discussion

- [4] Section 302(1)(a) of the Act provides:

“1. Sentences subject to review in the ordinary course:

- (a) Any sentence imposed by a magistrate’s court –*
- (i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191(2)(j) of the Children’s Act 2005 (Act 38 of 2005), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;*
 - (ii) which, in the case of a fine, exceeds the amount* determined by the Minister from time to time by notice in the Gazette for the respective judicial officers referred to in subparagraph (i);*

(iii)

shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.”

[5] In so far as the fine imposed is concerned it falls within the categories determined by the Minister therefore there shall be no further discussion in relation thereto.

[6] In ***S v Nxumalo & six other cases***¹, the Court held that the automatic review of the proceedings of a Magistrates' Court is related to an experience of the Magistrate, on the one hand, and the nature and the extent of the sentence, on the other. It is also irrelevant whether a sentence of imprisonment or a fine, or any part thereof, is suspended.²

[7] In the *Commentary on the Criminal Procedure Act*³ when dealing with the provisions of section 302, the authors remarked that, in some cases the mere fact that an accused is unrepresented could result in an unfair trial. They rely in this regard on the duties of the Magistrate as set out in ***S v Khanyile & Another***⁴.

[8] *In casu*, the learned Magistrate did not enquire at all from Ms Adam whether she required legal representation. The only questions that were put to her were the following:

¹ 2006 (1) SACR 1 (N) 2g – 3b.

² *S v Melani* 1991(2) SACR 611 (NC) 613d.

³ by Du Toit *et al under section 302*.

⁴ 1988 (3) SA 795 (N) at p 799 H-J.

'Court: Ms Geelbooi can you interpret the charge to Ms Adam, please.

Court: Is it correct that you are defending yourself? Is it correct that you are defending yourself in person?

Accused: Yes, Your Worship.

Court: Do you understand the charge that the prosecutor put to you?

Accused: Yes, Your Worship.

Court: How do you plead to this charge?

Accused: Guilty, Your Worship.'

[9] It is apparent from the above interaction between the Magistrate and Ms Adam that there was no enquiry about, *inter alia*, whether or not she would be interested in having legal representation, whether she could afford one, or whether she would seek assistance from the Legal Aid Board.

[10] After Ms Adam had pleaded guilty and after the prosecutor had accepted her plea, it was only then that the Magistrate explained the implications of the provisions of section 112 (1) (a) of the Act ⁵ to her.

⁵ "112 Plea of guilty

(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-

- [11] The language employed in section 112 (1) (a) is not peremptory because the Legislature employed the words ‘*may*’ instead of ‘*shall*’. Where a provision of the Act expressly permits a conviction without questioning, a court has to ensure that the consequences that flow from the plea of guilt, in those circumstances, are fully understood by the accused person.
- [12] Where the accused is not represented, it seems to me that, it would be prudent for the court to question the accused and satisfy itself that the accused appreciates the plea as well as the consequences thereof. This would ensure that an accused who really intended to plead guilty is convicted in a fair process. Similarly, the accused person who never intended to plead guilty, would be spared from the summary conviction. Once questioned, the risk of an accused person not appreciating the gravity of an offence, the plea itself and the requirements thereof would be minimised.
- [13] In sentencing Ms Adam, the Magistrate recorded under sentence ‘*Ms Adam did represent herself in this matter and the State was duly represented by the Public Prosecutor, Mr Mbuqu.*’ *Both Ms Adam and the State addressed the Court from the sidebar.*” Thereafter he went on to deal with the personal circumstances of the accused.
- [14] The manner in which the Magistrate dealt with the unrepresented Ms Adam was to place her on an equal footing with the public prosecutor, whereas the public prosecutor, is a legally qualified official. It is that imbalance that creates unfairness because the Magistrate assumed that because the accused

(a) *the presiding judge, regional magistrate or magistrate **may**, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only; and*
(i)...” (my emphasis).

person had pleaded guilty, she understood what the implications of that plea were, and could be convicted on the plea without being questioned. That, in my view, constituted an irregularity.

[15] In *S v Heskwa*⁶ Selikowitz J stated:

'i. *The automatic review procedure is designed to ensure that an undefended accused, who receives anything more than a very minor sentence, will have his trial proceedings and sentence examined and considered by a Judge of the Supreme Court who will then confirm, alter or set aside the conviction and/or sentence and makes such order for the further disposal of the matter as he considers just. Years of experience have shown that the system of automatic review is invaluable not only as a protection to the accused but also as a vehicle for the Judges to supervise and to guide the magistrates. Indeed, a cursory examination of the law reports will reveal that many important issues have been resolved as a result of the procedure.*

[17] This court finds that the proceedings that led to the conviction and sentence of Ms Adam were not in accordance with justice. In the circumstances, the proceedings are accordingly reviewed and set aside.

[18] I accordingly make the following Order:

Both the conviction and sentence are set aside.

⁶ 1992 (2) SACR 95 (C) at 96 paras i-j.

T.V. NORMAN

JUDGE OF THE HIGH COURT

I agree.

A. GOVINDJEE

JUDGE OF THE HIGH COURT

21 April 2023