

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

Case no: REV 54/2021

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE.....	SIGNATURE:.....

In the matter between:

THE STATE**And****THOLOKWETHU LUSIWE SIBANYONI****ACCUSED**

REVIEW JUDGEMENT

KGANYAGO J

- [1] The accused appeared in Mogalakwena district court before Mr TS Boloka (magistrate) on one count of theft of one packet of AAA6 Batteries valued at R99.99 from Pick 'n Pay Store. After the rights to legal representation were explained to the accused, he elected to conduct his own defence. The

accused pleaded guilty to the charge and the magistrate proceeded to question him in terms of section 112(1)(a) of the Criminal Procedure Act 51 of 1977 (Act).

[2] In questioning the accused the magistrate asked him the following questions:

“Q: On 22nd April 2021 were you at Pick ‘n Pay Mokopane Store?

A: Yes your worship.

Q: Did somebody forced you to go to Pick ‘n Pay and steal the alleged items?

A: No your worship.

Q: Have you done it with your own intention?

A: Yes your worship, but it is not that I went there with an intention to steal the items. I did not remove them from the shelves, I picked them up from the floor.

Q: But you have done that with your own intention.

A: Yes your worship.

Q: And you knew that it is unlawful to do that?

A: Yes your worship.”

The accused was found guilty as charged and sentenced to a fine of R1000.00 or two months imprisonment.

[3] When this matter was placed before me on special review, I asked the magistrate to comment on whether his questioning of the accused did not amount in the magistrate forcing the accused to admit intention, and also whether the accused answers to his questions did not raise a defence. The magistrate had replied as follows:

“1.1 The court was not forcing the accused to confirm the elements of intention rather the court was confirming to the accused that picking the item on the floor in the store and taking the same from the shelf of the same store does not change the intention to steal or committing an offence in this circumstances. It is my understanding that whether the accused picked the item from the floor or from the shelf, it is immaterial for the purpose of theft because it was the same store and there is no allegation of *res derelictae* nor *res nullius*.

1.2 The accused's answer that he did not go to the store with the intention to steal does not raise any defence in law because his intention to steal is determined at the crime scene not when he left somewhere else. His intention before the crime scene is irrelevant in this case. The important intention is when he saw the item on the floor inside the store and decided to take it without owner's consent or paying for it and having the intention to deprive the shop or owner that item permanently.”

[4] I have also requested the comments from the Deputy Director of Public Prosecutions (DDPP). In the opinion of the DDPP, the magistrate was asking questions with suggestive answers, and further that with the answers given by the accused, the magistrate ought to have entered a plea of not guilty in terms of section 113(1) of the Act. The DDPP submitted that the proceedings were not in accordance with justice, and they should be reviewed and set aside. The DDPP has further submitted that in view of the fact that the accused has already served his sentence, it will not be in the interest of justice to subject him to further proceedings.

[5] An accused person who plead guilty to the charges levelled against him or her must admit all the elements of the offence he or she is facing before been convicted in accordance with his or her guilty plea. The trial court is also entitled to question the accused person in terms of section 112(1)(b) of the Act in order to test the validity of his or her guilty plea. In questioning the accused, the trial court ought not enter the arena of the prosecution, and the

questioning must not encourage or persuade the accused to concede to the offence. The accused must in full inform the court how the alleged offence was committed. Out of the accused explanation, the court must determine whether accused has admitted all the elements of the offence, or whether his explanation raises a defence. At this stage it is not the duty of the court to determine whether the defence raised by the accused is plausible or not. It remains the duty of the State, and not the presiding officer to prove the guilt of the accused beyond reasonable doubt.

[6] In *S v Shiburi*¹ Makgoka AJA said:

“[18] ...The procedure set out in s 112 is designed to avoid the necessity for calling evidence in cases where it is clear that the accused both understand all the elements of the charge against him or her and admits them all. As observed by this court in *S v Naidoo* 1989 (2) SA 114 (A) at 121E-G, the section was designed to protect an accused from the consequences of an unjustified plea of guilty. In the constitutional era, the procedure in s 112 must be considered within the context of a right to a fair trial enshrined in s 35(3) of the Constitution. The constitutional right to a fair trial should guide the court in its determination of the ambit of the questions which should be put. See Commentary on the Criminal Procedure Act, service 54, 17-15.

[19] When questioning the accused in terms of s 112(1)(b) the court's duty is to determine whether the accused's factual statements and answers in his or her plea of guilty adequately support the conviction on the charge. It is not the courts' function to evaluate the plausibility of the answers, or to determine their truthfulness at this stage of the proceedings. Instead, for the purposes of the section, the accused explanation must be accepted as true. On that premise, the court should consider whether the explanation discloses a possible defence in law to the charge he or she pleaded guilty to. As is plain from the text of the section, the presence of doubt is a jurisdictional factor to trigger the application of the procedure laid

¹ 2018 (2) SACR 485 (SCA) at paras 18 and 19

down in s 113. Thus, once a basis for doubt exists, objectively considered, the court has no discretion but to apply the procedure set out in s 113.”

[7] In the case at hand, the magistrate has asked the accused leading questions which were eliciting answers which enticed the accused to make concessions, rather than to allow the accused to tell the court how he had committed the offence. Even where the accused’s answer seemed to raise a defence, the magistrate asked the accused a follow up question that persuade or encourage him to make a concession.

[8] The accused when asked whether he had the intention to steal, answered in the affirmative, but went on to state that he did not went to the shop with the intention to steal, that he did not remove the items from the shelves, but had picked them on the floor. On this explanation, the accused has raised a defence, and whether this was a valid defence, it was for the State to disprove that by leading evidence. The magistrate in his answer to the query, shows that he did not find the defence to be plausible. The magistrate’s follow-up question of putting it to the accused that he had done that with his own intention was entering the arena of the prosecution. What he should have done with that explanation was alter the guilty plea and enter a plea of not guilty in terms of section 113 of the Act. By failing to alter the accused guilty plea to a not guilty plea the magistrate has committed an irregularity

[9] Even if the magistrate’s questions and accused answered were allowed to stand, they are not sufficient to prove the guilt of the accused. There is no evidence as to where in the store, the accused was found in possession of the alleged items; whether he was still in the shop or whether he had already passed the till. If he was still in the shop, there is no evidence where on his

body the items were found. The accused was not given an opportunity to explain what was the relevancy of him saying that he had found the items lying on the floor. It was also not established where on the floor of shop had the accused removed these items.

[10] In my view, the accused was not given a fair trial in the manner in which the magistrate had conducted the proceedings. I therefore agree with DDPP that the proceedings were not in accordance with justice, and they stand to be reviewed and set aside. I also agree with the prosecution that since the accused had already served the sentence, it will not be in the interest of justice to subject him to further prosecution.

[11] In the result I make the following order:

11.1 The conviction and sentence of accused is reviewed and set aside.

KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

I AGREE

KGOMO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLKWANE**

DATE DELIVERED : 20th July 2021