

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR654/2017

In the matter between:

KHULEKANI MSIYA

Appellant

and

THE STATE

Respondent

JUDGMENT

Date of Hearing: 03 August 2018
Judgment handed down on: 31 August 2018

THE COURT:

[1] Khulekani Msiya appeared in the Regional Court, Ixopo, before Mr Odendaal. He pleaded guilty to using the property of an owner without his consent and was convicted. His previous convictions were proved and he admitted them. During evidence in mitigation he raised a defence and his plea was altered to one of not guilty in terms of s113 of the Criminal Procedure Act 51, 1977 ("the Act") and the matter was directed to proceed before another presiding officer.

[2] Having perused the previous convictions Mr Odendaal requested that all the cases relating to those previous convictions be placed before him. He established that the three cases were all dealt with by an acting magistrate, Mrs

Sima. In his view there were blatant defects in the said matters which required that they be reviewed by this court.

[3] He then sent cases “B727/2016”, “B785/2016” and “B33/2017”, Ixopo, on special review to this court and submitted a detailed covering memorandum indicating why they were being submitted on special review and suggesting why the related convictions and sentences, *inter alia*, ought to be set aside.

[4] In case B727/2016 the accused was charged with housebreaking with intent to steal and theft. He pleaded guilty and the matter proceeded in terms of s112(1)(a) of the Act. No previous convictions were proved. He was convicted as charged and fined R500-00 or, in lieu of payment thereof, committed to 35 days imprisonment. The charge he faced was one of housebreaking with intent to steal and theft and it was recorded on the J15 on 28 November 2016 that he was guilty in terms of s112(1)(a) of Act 51 of 1977 and the words “possession of stolen property” were endorsed thereon by Mrs Sima.

[5] The judgment on the J15 however was endorsed with the words “guilty as charged”. The sentence is recorded as “see annexure “B” “ which records a sentence of R500-00 or 35 days imprisonment of which R500-00 or 35 days is suspended for five (5) years on condition that the accused is not convicted of receiving stolen property or any crime involving dishonesty during the period of suspension.

[6] It appears from the record that a printed form was used. It is recorded that the accused had no objection to the matter being finalised in terms of s112(1)(a)

of the Act. Submissions made in mitigation are recorded on the said form as well as an indication that he was warned of his right to appeal.

[7] In case B785/2016 it is indicated once again on the J15 that he pleaded guilty in terms of s112(1)(a) of the Act to a charge of housebreaking with intent to steal and theft of goods totalling approximately R2,000-00. He was found guilty and sentenced to a fine of R1,000-00 or 35 days imprisonment of which R1,000-00 or 35 days imprisonment were suspended for five (5) years on condition that he was not convicted of housebreaking with intent to steal and theft during the period of suspension.

[8] Once again a printed form was used for these proceedings.

[9] In case B33/2017 the same procedure was followed. The charge was once again housebreaking with intent to steal and theft and the accused was sentenced to a fine of R300-00 or 30 days imprisonment.

[10] In none of these cases were previous convictions proved or dealt with.

[11] The three special reviews were dealt with by Mngadi AJ (as he then was) on 1 September 2017 who, notwithstanding Mr Odendaal's memoranda, and without comment, certified that the proceedings were in accordance with justice.

[12] On 6 October 2017 Mr Odendaal referred the three matters back to this court requesting the Judge President that they be placed before the full court. He states:

“[However], the [three] cases were handed to the [Honourable Acting Judge Mr Mngadi]. He never considered the special review requests at all. He merely rubber stamped it ‘as in accordance with justice’. It is unclear what he found to be correct? (sic). Is it the original cases ? (sic) or my special review requests to declare the proceedings null and void.”

[13] On 24 October 2017 Mnguni J dealt with the request for a further review of the said matters and referred the matter and Mr Odendaal’s comments to the Director of Public Prosecutions, KwaZulu-Natal (“the DPP”), requesting her to consider the matter and the comments and to make submissions thereon.

[14] On 3 November 2017 Ms Blumrick from the office of the DPP, in the course of a detailed submission, suggested that the matter be brought before a full bench (she obviously meant the full court) for consideration. The registrar thereafter set down the matter before the full court for review.

[15] Appearing for the DPP, Mr Radyn submitted that the state’s election not to present the accused’s previous convictions prior to the imposition of sentence is not a ground of review. He submitted further that the decision to put suspended sentences into operation can only be made once the review has been finalised.

[16] He however submitted that the proceedings were vitiated due to certain irregularities, *inter alia*, that the accused was not informed at the first appearance of his right to legal representation and that he therefore could not have made an informed decision; that the matters were finalised at the first appearance, a so-called instant trial, and they were dealt with too hastily; and that it was irregular to convict and sentence an accused in terms of s112(1)(a) of the Act on a charge of

housebreaking with intent to steal and theft as this was a serious offence that required questioning in terms of s112(1)(b) of the Act.

[17] He went on to submit that before a court can proceed in terms of s112(1)(a) of the Act it must be satisfied that the offence in question did not merit a sentence in excess of that which is permitted in terms of the Act and that the presiding officer did not exercise her judicial discretion correctly.

[18] In case B727/2016, although it was noted that the accused was found guilty as charged, he was charged with housebreaking with intent to steal and theft but in his plea indicated that he pleaded guilty to possession of stolen property. This result could accordingly not have been reached on the facts as they unfolded.

[19] A further irregularity concerned the application of s103(2) of the Firearms Control Act, 2000. In case B785/2016 the pro forma form used deleted the reference relating to being unfit to possess a firearm and accordingly it is not clear whether this was dealt with.

[20] It was submitted that the proceedings in the lower court were not in accordance with justice, that they had to be set aside and that the matters ought to commence *de novo* before another magistrate.

[21] Ms Andrews who appeared on behalf of the accused conceded that the proceedings were not in accordance with justice but submitted that if the proceedings are set aside and had to commence *de novo* it would be prejudicial to the accused as he would then potentially face a lengthier term of imprisonment.

[22] S112(1)(a) of the Act allows for an accused to be found guilty on his plea of guilty without any questioning. This is however only in the case of minor offences. The offence must not merit imprisonment without the option of a fine which may not exceed R5,000-00. In *S v Cooke* 1977 (1) SA 653 (A), which dealt with a similar section in the previous Criminal Procedure Act, it was held that it was the duty of a magistrate to decide whether an offence is of such a trivial nature that it meets the requirements of the proviso in the said section.

[23] S112(1)(a) of the Act specifically requires that in the opinion of the magistrate the offence did not merit punishment of imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time. In each of these cases the charges were housebreaking with intent to steal and theft. Each one of them was a serious offence and from a mere reading of the charge sheet it must have been clear to the presiding magistrate that on conviction a term of imprisonment was indeed a real possibility and that in the event of a fine being imposed that it would potentially exceed the amount of R5,000-00. As held in *S v Patterson* 1977 (1) SA 27 (ECD) at 29G, it is difficult to understand how the magistrate in these cases, if they were approached correctly, could have come to the conclusion that the offences would not warrant a term of imprisonment, alternatively a fine which would not exceed R5,000-00.

[24] Housebreaking with intent to steal and theft are serious offences which should not be dealt with in terms of s112(1)(a) of the Act. See *S v Aniseb and Another* 1991 (2) SACR 413 (Nm) at 416h. Given the seriousness thereof the

presiding officer, if she had exercised her judicial discretion correctly, could not have been of the opinion that it could be dealt with in terms of s112(1)(a) of the Act.

[25] The charge of housebreaking with intent to steal and theft consists of elements of breaking and entering and the taking of property. Intention also needs to be established. If the accused was questioned in terms of s112(1)(b) of the Act he may well not have admitted all the elements of the offence and could also have raised a defence which would have necessitated the application of s113 of the Act.

[26] In *S v Addabba; S v Ngeme; S v Van Wyk* 1992 (2) SACR 325 (T) a full court held at that s112(1)(a) must be used sparingly and only where it is certain that no injustice will result from its application. It is for minor offences.

[27] The learned regional magistrate, Mr Odendaal, was accordingly correct in sending the three cases on special review and he must be commended for his persistence.

[28] The proceedings in the three matters were not in accordance with justice and should not have been so certified when they came to this court on special review.

[29] In *S v Katu* (2001) SACR 528 (ECD) and *S v Maseko* 1971 (4) SA 475 (T) it was held that a different judge is able to withdraw a certificate granted by a judge in terms of s304(1) of the Act.

[30] This court can therefore withdraw the certificates in respect of the three cases.

[31] In any event, we are at large in that regard given the material irregularities that occurred.

[32] The following order is accordingly made:

- a. The certification by Mngadi AJ that the proceedings in cases B727/16, B785/16 and B33/17 in the Ixopo Magistrate's Court in the *State v Khulekani Msiya* were in accordance with justice is set aside and withdrawn.
- b. The convictions and sentences in the said cases are set aside and the matters are referred back to the Ixopo Magistrate's Court to commence *de novo* before another magistrate.

Seegobin J

Vahed J

Bezuidenhout J

Date of Hearing: 03 August 2018

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APPEARANCES

Counsel for Appellant: Ms Andrews
Instructed by: Justice Centre, Pietermaritzburg

Counsel for Respondent: Mr Radyn
Instructed by: DPP, KZN, Pietermaritzburg