

A 186/17

12/4/2017



A 186 / 17

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

2017.04.10
DATE

J. M. M. M.
SIGNATURE

HIGH COURT REF. NO.: 272/16
MAGISTRATE'S CASE NO.: 4542619
MAGISTRATE'S SERIAL NO.: J534

DATE: 12
~~10~~ April 2017

THE STATE

And

JENNIFER ANNE RADEMEYER

REVIEW JUDGMENT

MABUSE J:

- [1] This matter came before me as a special review. It involves a certain Jennifer Anne Rademeyer who, for the purposes of this judgment, shall be referred to as "the accused".

[2] Having received this record from Magistrate's Office Pretoria and the said office having responded satisfactorily to all the correspondence I had sent to them, I forwarded the whole file to the office of the National Director of Public Prosecutions, Pretoria, and requested that office to furnish me with their comments after perusing the contents of the file. In the NDPP's office the matter was assigned to Mr. L. Williams and Adv. H van Rensburg who furnished me with an erudite opinion. I am greatly indebted to both of them and the office of the NDPP.

[3] On 8 September 2014 the accused was arrested at a Checkers Store in Gezina, Pretoria, after she had committed shoplifting which is simply theft from a shop. After her arrest she was taken to Gezina Police Station ("the Moot") where she was served with a document called "Notice of Rights In Terms of The Constitution". This document is also called "SAPS 14A". It was issued in terms of s 35 of the Constitution of the Republic of South Africa Act No. 108 of 1996 ("the Constitution"). For purposes of brevity this document will be simply referred to as "SAPS 14A". It contains the following information:

"(1) You are being detained for the following reason: Shoplifting.

(2) As a person who is detained you have the following rights:

(a) you have the right to consult with a legal practitioner of your choice or should you so prefer, to apply to the Legal Aid Board to be provided by the State with the services of a legal practitioner;

(b) you have the right to challenge the lawfulness of your detention in person before a Court of Law and to be released if such detention is unlawful;

(c) you have the right to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate accommodation, nutrition, reading material and medical treatment at State expense; and

(d) you have the right to be given the opportunity to communicate with, and be visited by, your spouse or partner, next of kin, religious counsellor and medical practitioner of your choice.

- (3) *As a person arrested for the alleged commission of an offence you have the following rights:*
- (a) *you have the right to remain silent and anything you say may be recorded and may be used as evidence against you;*
 - (b) *you are not compelled to make a confession or admission which could be used in evidence against you;*
 - (c) *you have the right to be brought before a court as soon as reasonably possible but not later than 48 hours after your arrest or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or a day which is not an ordinary court day;*
 - (d) *you have the right, at the first court appearance after your arrest, to be informed of the reason for your continued detention or to be released; and*
 - (e) *you have the right to be released from detention if the interests of justice permit, subject to reasonable contentions.*
- (4) *You can exercise all the above rights at any stage during your detention."*

[4] In the middle of SAPS 14A, is a portion called Certificate By Detainee. The current certificate states as follows:

"I, Ms. Jennifer Rademeyer (name of detainee) hereby certify that I have been informed in English "State Language" of my rights in terms of the Constitution as set out above by constable Rakorofe (name of person who informed the detainee) and that I understand the contents thereof.

Date: 2014/09/08 Time: 12:30 Place: Pretoria

Signature/thumbprint of detainee

Signature of person who informed the detainee."

It was signed by the detainee, in this instant case by the Accused and a person who explained her rights to her.

[5] At the time the accused was handed the said SAPS 14A, she was also handed, in terms of s 56 of the Criminal Procedure Act 51 of 1977 ("the CPA") a written notice to appear in court. This written warning, which for purposes of simplicity, may be called J534, contained a warning that:

"Admission of guilt fine of R500.00 may be accepted."

She was notified that she would appear at Court on 9 September 2014. Instead of attending Court where the case against her would have been dealt with by the court, she opted, without the benefit of any legal advice, to pay, on 8 September 2014 and at Gezina Police Station, the admission of guilt of R500.00. Upon payment of the said amount of R500.00 she was issued with an admission of guilt receipt number WR892680. She was then released from custody.

[6] One can only guess that she subsequently sought a clearance certificate from the South African Police Services. The certificate, dated 23 March 2016, recorded that she was convicted of theft and furthermore that she was, upon conviction, fined R500.00. This revelation was unexpected. She was stunned, confused and frustrated. On 19 May 2016, she made the following affidavit which she sent to the Magistrate Pretoria:

"AFFIDAVIT

I, the undersigned

JENNIFER ANNE RADEMEYER

Hereby make oath and state as follows:

1. *The facts deposed to in this affidavit are true and correct.*
2. *On the 9th of September 2014 I was arrested for shoplifting. At the time I was permanently ill and needed vitamins to be able to continue my studies and did not have the money to pay for it. My parents were also going through a rough patch, divorce, so asking them for money was not an option.*
3. *I was caught and sent to the nearest police station (PTA Moot).*

4. *At the police station it was not explained to me that signing an admission of guilt will be held against me for a 10 year period. I was unaware of the consequences by signing the admission of guilt.*
5. *I found out recently that I am missing papers related to my crime. I never received nor signed a summons. The option of going to court was not even mentioned to me by the police station.*
6. *I paid a R500 fine and was released.*
7. *I now have a support system in place which I didn't have before committing this crime.*
8. *Since then I have been struggling to get a decent job and would really like to clear my name so that I can move forward and start building a promising future.*

JENNIFER RADEMEYER

I, Jennifer Rademeyer, state the information provided in this affidavit are true and was signed on 19 May 2016."

Based on the foregoing affidavit, the magistrate then sent the matter to the registrar of this Court as a special review in terms of s 304(4) of the CPA.

- [7] Now that she has become aware of the effect of admitting her guilt [by the admission of guilt] coupled with her payment of the admission of guilt fine of R500.00, the accused wants to retract her admission. In a way, she wants her conviction of theft to be set aside and the resultant fine of R500.00 to be refunded to her. The grounds of doing so appear in her affidavit. She states that:

- "4. *At the police station it was not explained to me that signing an admission of guilt will be held against me for a 10 year period. I was unaware of the consequences by signing the admission of guilt.*
5. *I found out recently that I am missing papers related to my crime. I never received nor signed a summons. The option of going to court was not even mentioned to me by the police station."*

[8] Section 56(1) of the CPA provides that:

- "(1) If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by a notice in the Gazette, such peace officer may, whether or not the accused is in custody, hand to the accused a written notice which shall -*
- (a) specify the name, the residential address and occupation or status of the accused;*
 - (b) call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question;*
 - (c) contain an endorsement in terms of s 57 that the accused may admit his guilt in respect of the offence in question and that he may pay a stipulated fine in respect thereof without appearing in court; and*
 - (d) contain a certificate under the hand of the peace officer that he has handed the original of such written notice to the accused and that he has explained to the accused the import thereof.*
- (2) If the accused is in custody, the effect of a written notice handed in under subsection (1) shall be that he be released forthwith from custody.*
- (3) The peace officer shall forthwith forward a duplicate original of the written notice to the clerk of the Court which has jurisdiction.*
- (4) The mere production to the court of the duplicate original referred to in (2) shall be prima facie proof of the issuing of the original thereof to the accused and that such original was handed to the accused."*

[9] Section 56 requires no more from the police officer that he must sign a certificate and a warning that he has handed the original of such written notice to the accused and that he has explained to the accused the import thereof.

[10] Section 57 provides as follows:

"(1) Where -

(a)

(b) a written notice under s 56 (in this section referred to as the written notice), is handed to the accused and the endorsement in terms of paragraph (c) of subsection (1) of that section purports to have been made by a police officer;

The accused may, without appearing in court, admit his guilt in respect of the offence in question by paying the fine stipulated (in this section referred to as the admission of guilt fine) either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the fine may be paid at a specified local authority, at such local authority.

(2) (a) the summons or the written notice may stipulate that the admission of guilt fine shall be paid before a date specified in the summons or a written notice, as the case may be.

(6) An admission of guilt fine paid at a police station or a local authority in terms of subsection(1) and the summons or, as the case may be, the written notice surrendered under subsection (3) shall, as soon as is expedient, be forwarded to the clerk of the magistrate's court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice surrendered to the clerk of the court under subsection (3), in the criminal record book for admissions of guilt, whereupon the accused concerned shall; subject to the provisions of (7), be

deemed to have been convicted and sentenced by the Court in respect of the offence in question."

- [11] No duty is imposed on the police officer to "warn the accused of the full consequences of paying an admission of guilt fine", as stated by Henney J, in *S v Tong* 2013(1) SACR 346 (WCC) at paragraph 25 ("Tong"). He continued and stated that:

"As such, the accused must be informed that he or she will be deemed to have been sentenced and convicted by the court with jurisdiction in respect of the offence in question. It must be furthermore explained to an accused that, if it is indeed the case, such conviction will appear on the accused's criminal record. A police officer must further inform the accused that, as a consequence of paying an admission of guilt fine, an accused would be waiving the right to be sentenced only upon proof beyond reasonable doubt that one is guilty of the commission of the offence, the right to contest the allegations in open court, the right to confront one's accusers, the right to call witnesses and the right to legal representation. A police officer must state in a certificate referred to in s 56(1)(d) of the Act contained in a written notice, that he/she has indeed warned the accused in the above manner."

- [12] In my view, Henney J's approach is reasonable and well founded. The approach could be included either in s 56 or 57 in order to make it easier for the police to act upon it. The police do not consider it as part of their duties to explain the effect of the payment of an admission of guilt as long as such warning is not contained in any of the documents they give to the accused. Failure by the police to warn the accused carries no consequences either for them or the accused. A police officer effecting an arrest on a suspect is duty bound to warn the suspect of his "Constitutional rights". This duty is imposed by the law on the police officer. It is therefore obligatory for the policemen to do so. On the other hand no such duty exists on the policemen in terms of s 56 of the CPA. Accordingly an accused person cannot be heard to complain that he or she was not warned or that certain explanations were not made. In considering such a complaint the starting point should be was there a duty imposed on the police officer who hands the accused person a notice to appear in court in

terms of s 56 of the CPA to warn the accused of anything outside the summons? If the answer is no, *cadit quaestio*.

[13] In the instant matter, it is not the accused's case that she was misled nor that she did not understand her rights or the contents of the documents given to her. She complains that it was never explained to her that paying the admission of guilt would end in her having a criminal conviction. There was no duty upon the policemen to do so. Would the situation have been different if she had gone to court as she now wants to do so and pleaded guilty? Would she have been warned at any stage during the trial that upon conviction she would have a criminal record? Neither magistrate nor Judge warns an accused in advance that if she is convicted she will have a criminal record. Nowhere is it prescribed that a magistrate or Judge should do so. In *S v Cedras* 1992(2) SACR 530 C at 531j – 532b the court set out the principles at great length applicable to a review of this type which may be summarised as follows:

13.1 Are there considerations of equity and fair dealing which compel the court to intervene to prevent a probable failure of justice?

13.2 The accused must show good cause for mistakenly or erroneously admitting guilt; and

13.3 The accused must show that, were the charge to go to trial, she would have a probable or arguable defence.

13.4 The accused in this case must explain why it took her so long to take steps to challenge her conviction. *In casu* she paid the admission of guilt on 8 September 2014 but only complained or took steps to challenge her conviction on 19 May 2016 when she made the affidavit. The fact that it took her so long is indicative of the fact that she had found nothing wrong with the manner in which the policeman had handled the s 56 notice; she had accepted her fate. If there was anything wrong with the manner in which the s 56 notice was handled she would have done something between 8 September 2014 and 19 May 2016 in order to challenge the conviction.

13.5 Lastly, regard must be had to the reason for setting aside the conviction. In this case it is clear that the desire to challenge the conviction only arose after she had become aware that she has a previous conviction.

This is how the court put it at page 531 J – 532 B:

"In such cases the question must always be whether there are considerations of equity and fair dealing which compel the court to intervene to prevent a probable failure of justice. There must be evidence before the court showing the likelihood of such inequity should it not intervene. A court must be satisfied that the admission of guilt was probably mistaken or incorrect and that the accused or other person deposing on oath on his behalf must give a satisfactory explanation as to how the admission of guilt came to be mistakenly and erroneously made. Good cause must be established for condoning the error or mistake in making the admission of guilt. It must be established that, were the charge to go to trial, the accused would have a probable or arguable defence to the judge and that his deemed conviction of sentence is, accordingly, probably not in accordance with justice."

[14] In the instant case, as I pointed out earlier, the accused did not complain about being misled into admitting her guilt, nor did she state that she pleaded guilty by mistake. She did not say that she believed that if the matter went to court she would probably not be convicted on a plea of guilty. Most importantly she does not say that if convicted by a court of law she would not have picked up a criminal record. She does not state that she could avoid a conviction that follows upon an admission of guilt by being convicted by a court under normal circumstances. It serves no purpose for me to set aside the conviction following the admission of guilt in order to avoid having a criminal record when even a conviction ordinarily by a court of law would have had the same effect. A criminal record is an unavoidable consequence of a criminal conviction. Once convicted, whether after paying an admission of guilt or by a court in the ordinary conduct of its proceedings, an accused has no choice of avoiding a record of the criminal conviction. Consideration of whether or

not to set aside this conviction must be done with fairness and without prejudice to the interest of the administration of justice. The State may be prejudiced by the unavailability of witnesses who may have died in the meantime or have moved to other places and have become untraceable. Moreover if this conviction is set aside and the matter is sent to trial it is always open to the State to prove against her that the accused had admitted guilt and had also paid a fine. The accused may not be able to cross this bridge.

[15] In *S v Viviers* 1988(1) SA 984 (SWA) ("Viviers"), the court set the scene as follows at page 988 C-D:

"Dit is gemene saak dat die dagvaarding ingevolge die bepalinge van artikel 57(1)(a) van die Strafproseswet ge-endosseer was dat die appellant sy skuld ten opsigte van die misdade kon erken, en dat hy 'n boete kon betaal sonder om in die hof te verskyn. Verder is dit gemene saak dat die appellant wel die betrokke boete betaal het ..."

Similarly the summons in the instant matter was issued in terms of s 56. The accused was warned that she could pay an admission of guilt in the sum of R500.00 and similarly that the accused admitted her guilt and paid the said amount of R500.00. Surprisingly she states in her affidavit that she received no summons or a copy of the summons. She also contends that the option of going to court was not even mentioned to her by the police. In my view, the accused was not honest with this Court when she testified in her affidavit that she never received nor signed a copy of the summons. The only place where an amount of R500.00 fine was mentioned was on the summons that she claimed that she did not receive. The said document, called J534, makes it clear that it was a written notice to appear in court. She was informed in the same document that the Place of Trial was Pretoria Magistrate; that she must appear before Court on 2014.09.09 and finally that she may admit her guilt in respect of the offence in question by paying the stipulated fine in respect thereof without appearing in Court. By claiming in her affidavit that the option of going to Court was not even mentioned the accused is being disingenuous. In my view, the accused was not honest with this Court in this respect. The Court in *Viviers* continued and made the following remarks:

"Mnr. Maritz het aangevoer dat die landdros se beslissing ingevolge artikel 57(7) daarop neerkom dat die appellant se handeling met betrekking tot die betaling van die boete geheel en al ter syde gestel was en as pro non scripto beskou moet word. Gevolglik was die Staatsaanklaer, volgens Mnr. Maritz, nie geregtig om enige vrae daaroor onder kruisondervraging te stel nie." – at 988 E-F

Referring to the conduct of the appellant in admitting guilt and paying the fine the Court had this to say:

"Dit beteken egter nie noodwendig dat getuigenis aangaande sodanige handeling toelaatbaar is nie. Indien die handeling 'n afleiding regverdig wat neerkom op 'n bekentenis of die erkenning van 'n wesentliche nadelige feit is dit slegs toelaatbaar indien dit vrywilliglik geskied het en nie deur dwang of onbehoorlike beïnvloeding uitgelok was nie. Die vervolging moet die vrywilligheid van die bekentenis of erkenning bewys, maar daardie plig ontstaan eers wanneer die omstandighede 'n aanduiding gee van dwang of onbehoorlike beïnvloeding." – at 988 G-I

[16] According to Viviers an admission of guilt with the accompanying payment of the fine must be regarded as a confession or admission, depending on the circumstances, of an essential fact detrimental to the accused's case. Such a confession or admission is admissible, against the accused, provided that it was made freely and voluntarily or provided furthermore that it was not a product of force or undue influence. In other words, in order to succeed with the request to set aside the conviction and the sentence, the accused must satisfy the Court that when she admitted guilt that she had committed the offence of theft, she was forced to do so or was unduly influenced to do so. This means that she did not make an admission freely and voluntarily. As pointed out, she does not contend that her admission was not freely and voluntarily made.

[17] In Viviers, the court cited with approval the following passage from *R v Melozani* 1952 (3) SA 639 A at page 644 where Van den Heever JA, as he then was, had the following to say:

"It was held, however, that unless something suggested by the accused, by the circumstances under which the statement had been made, or by the nature of the statement itself, or otherwise, raised some doubt in the mind of the court as to whether the statement sought to be proved had been made freely and voluntarily, there was no duty cast upon the prosecution to prove that it had been so made, and the Court might infer it was free and voluntary without any proof of fact."

[18] I agree with Mr. Williams and Adv. Van Rensburg that while a certificate to the effect that the police officer has explained the full import of the process may be desirable, the absence thereof does not imply that the accused's rights to a fair trial or process were trampled. Both Mr. Williams and Adv. Van Rensburg contend that the Tong judgments set out the requirements to be adhered to before a magistrate can confirm the conviction. These requirements are so onerous and open to interpretation that all admissions of guilt fines currently paid where the necessary averments are made will be set aside, increasing the burden on the Court. An example of this is the nature of the evidence required before the magistrate can be satisfied "that an accused person has been given an opportunity to consider payment of the fine or to be given an opportunity to appear in court to contest it." Now the law does not impose any legal duty on a police officer who acts in terms of s 56 to warn the accused of the ramifications of any admission of guilt.

[19] Only if the law could be developed to incorporate into the relevant s 56 the approaches set out in *S v Tong* and *S v Parsons* 2013(1) SACR 38 WCC at p 41 at e-h where the Court stated that:

"Nowhere in the above quoted written notice to appear is there a warning that payment of the stipulated admission of guilt fine translates into a conviction. This is not fair to unsuspecting members of the public. This form needs improvement, because, as it stands, it may not pass constitutional muster. It cannot be left to the police officer serving an accused person with the written notice to appear to also explain to such accused person that, "look, upon payment of this admission of guilty fine you shall be deemed (for legal purposes) to have been duly convicted, and

an entry shall be made correspondingly in the SAP69." The form quoted above came into existence prior to the present Constitutional era. At that time no emphasis was placed on the rights of an accused person at all. The correct procedure is that the police officer must warn the accused about the conviction record. An endeavour must also be made by the powers that be to include this warning on the prescribed notice to appear which is handed to an accused person."

[20] In this case it is as clear as crystal from the affidavit submitted by the accused herself that she still admits her guilt. Had she gone to trial and been convicted, she would still have a previous conviction. I am satisfied that the accused was extensively appraised of her rights prior to the payment of the admission of guilt fine. This appraisal occurred on 8 September 2014, a day before she paid the fine. At the time she was informed in a written notice that she may admit the guilt in respect of the offence in question by paying the stipulated fine in respect thereof without appearing in court.

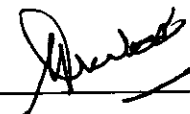
[21] In conclusion, the proceedings in the current matter are hereby confirmed.



P.M. MABUSE

JUDGE OF THE HIGH COURT

I agree,



W.R.C. PRINSLOO

JUDGE OF THE HIGH COURT