



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: R132/2017

In the application between:

THE STATE

and

MZWANDILE PATRIC GQIBA

CORAM: NAIDOO, J *et* LEFENYA, AJ

JUDGMENT BY: LEFENYA, AJ

DELIVERED ON: 14 SEPTEMBER 2017

REVIEW JUDGMENT

- [1] This matter comes before us on special review in terms of section 304 (4) Act 51 of 1977 from the Magistrate Bloemfontein.

The case is brought to this court by Senior Magistrate Matshaya after the Control Magistrate was of the view that the proceedings were irregular and that the conviction and sentence should be set aside.

- [2] The accused, Mr. Mzwandile Gqiba, was convicted of theft of cosmetics valued at R 94, 95 and the Magistrate after the state proved a list of previous conviction against accused, cautioned and discharged accused on sentence.

- [3] The control Magistrate found the following to be irregular;
- 3.1 That the presiding officer invoked the provisions of section 68 (1) e Act 51 of 1977 incorrectly by revoking accused's warning and keeping him in custody when this could not have been done.
 - 3.2 That the charge was not read to the accused before he pleaded.
 - 3.3 That despite advice by the prosecutor the magistrate invoked the provisions of section 112 (1) (a) instead of section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 (CPA).
 - 3.4 That after conviction the magistrate did not explain the rights of accused in mitigation nor afford him an opportunity to lead the necessary evidence in mitigation.
 - 3.5 That the sentence imposed is inappropriate taking into account the previous convictions of accused and that the

magistrate has accepted that the accused has the propensity of committing offences of which dishonesty is an element.

- [4] Section 304(4) Criminal Procedure Act 51 of 1977 states that if in any criminal proceedings a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which a sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section. Section 303 reads as follows:

“303. Transmission of record. - The clerk of the court in question shall within one week after the determination of a case referred to in paragraph (a) of Section 302 (1) forward to the registrar of the provincial or local division having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish to append thereto, and with any written statement or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as possible, lay the same in chambers before a judge of that division for his consideration.”

- [5] The Magistrate responded to the query and gave reasons why she proceeded in the manner she did. According to the trial Magistrate she does not see the basis for the query by the Control Magistrate irrespective of the defects appearing on the record and the Control

Magistrate making them clear. The trial magistrate went on to cite the value of the goods, the fact that they were recovered and further that count 2 was withdrawn as the reason for a lesser sentence. In my opinion these were not the only factors to consider.

- [6] The accused has a long list of previous convictions which are relevant and which, amongst other reasons was the factor to consider and which the Control Magistrate correctly raised.
- [7] Having read the record of proceedings and reasons advanced by the Control Magistrate, this court finds that the control Magistrate was correct in finding irregularities on the part of the trial magistrate.
- [8] The reasons advanced by the Control Magistrate are numerous and in my opinion sound enough to warrant intervention by this court in terms of the above mentioned section.
- [9] It was an irregularity, amongst others, for the trial magistrate to allow the accused to plead to the charge which was not clearly read out to him. The trial magistrate went on further to misdirect herself by not invoking the provisions of the correct section of the CPA, and looking at the previous convictions of the accused the sentence imposed is not in accordance with justice.

- [10] The court is therefore satisfied that that the proceedings and sentence imposed were not in accordance with justice.

ORDER

I accordingly propose that the following order be made:

1. The conviction and sentence are set aside.
2. The matter is referred back to the Magistrates' court for the trial to start *de novo* before another magistrate.

B.R. LEFENYA AJ

I agree it is so ordered

S. NAIDOO, J