

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

A950/2014

6/1/2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1)REPORTABLE: YES/NO	
(2)OF INTEREST TO OTHERS JUDGES: YES/NO	
(3)REVISED	
12/12/2014	
DATE	SIGNATURE

REVIEW CASE NO: A225/14
A QUO CASE NO: 26/2014
HIGH COURT REF:607/2014

In the matter between:

THE STATE

Appellant

And

NHLANHLA UNIFY MALULEKE

Accused

REVIEW JUDGMENT

STRAUSS, AJ:

[1] This matter comes before this Court in terms of section 303 of Act 51 of 1977, the Criminal Procedure Act, as it was referred to this Court for automatic review.

[2] The accused a 20 year old male, was convicted in the magistrates court Malamulele, on a charge of housebreaking with the intent to steal goods

to the value of R899. He pleaded guilty and the magistrate questioned the accused in terms of Section 112 (1) (b) of Act 51/1977. (CPA)

- [3] The court sitting in review had regard to the record of the proceedings and directed questions to the magistrate on 5 August 2014, to answer to the finding *prima facie* that the questions posed by the magistrates in terms of Section 112 (1) (b) of the CPA, where a regurgitation of the charge sheet. No particular questions were put to the accused that point to questioning that could in the premises have indicated to the magistrate that the accused had specific knowledge of the crime and admitted the specific elements of housebreaking, more specifically in the face of the failure of the magistrate to question the accused as to “how” he broke in.

- [4] This was a crucial question on the charge the accused faced as housebreaking is only committed when a structure is penetrated by removing or breaking open a door, a window or any other hindrance that would give a person access to the building or house, otherwise the crime would only be one of theft.

- [5] As to the sentence, the magistrate was questioned as to if the sentence was appropriate and in accordance with justice, due to the fact that the state did not prove any previous convictions. In spite of this the magistrate had regards and took cognisance of the accused very relevant previous conviction of housebreaking, for which he received a suspended sentence. The accused admitted such under cross examination by the state, in mitigation of his sentence. This is reflected in imposing a sentence 24 months direct imprisonment, to the accused, a 1st offender.

- [6] The magistrates was requested to answer under which section of the CPA , or the Constitution, did he allow this incriminating evidence and took cognisance thereof, and mentioned such in the sentence imposed.
- [7] The magistrates in answering the questions posed by the reviewing judge, conceded that the questioned posed were not such that one could determine the true guilt of the accused, and submitted that he would ‘guide” *sic*, guard against it in future, and stated that as there was no prejudice suffered, the conviction must be confirmed.
- [8] The magistrate answered as to considering the previuos conviction in sentence, that the sentence was justifiable even if the accused was treated as a first offender.
- [9] The office of the DDP also provided comment in the review and confirmed that the legal position of questioning in terms of Section 112(1) (b) of the CPA, it was trite in that such questioning ought to be such that the trail court can establish whether the accused is truly guilty of the offence he /she is pleading guilty to. This was set out in ***Mkhize v the State & Another 1981 (3) SA 585 (N) at 586D -578A***; where Broom J referred to a passage in ***S v Witbooi & Others 1978 (3)SA 590 (T)***

“Section 112 (1)(b) and Section 112 (2) and (3) are primarily concerned with the facts of the case and to ensure that an accused person is guilty of the offence to which he has pleaded guilty and also to ensure that he is properly sentenced on the true facts of the case. It follows that, where a

magistrate acts under the provision of these sections, he should follow a course that would enable him to ascertain the true facts of the case.

The course recommended is to question the accused himself with reference to the alleged facts of the case in order to ascertain what his version is so that the prosecutor can know whether the account of the accused agrees with the evidence he has at his disposal. If his account does not agree with the evidence of the prosecutor which the persecutor has available, the prosecutor may then decide to place his evidence before court and it will then be for the court to adjudicate upon the facts of the case.

Vide: **Mudau v S (276/2013) [2013] ZASCA 172** delivered on 28 November 2013

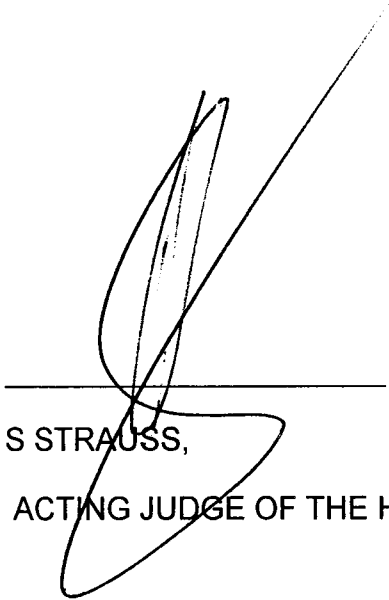
- [10] The DDP in their remarks to the reviewing judge confirmed that the magistrate in the matter *in causa* did not obtain facts from the accused regarding the offence, and that the trial court simply framed the questions in accordance with the charge sheet and the accused with the exception of one answer mainly answered," I admit"
- [11] The DDP also agreed that in view of the above and our constitution, the right of the accused to a fair trial is doubted. The DDP also confirmed that where a conviction and sentence under Section 112, are set aside on review, and it is found that any provision of Section 112 (1) (b) of the CPA were not complied with, the court shall remit the case back to the trial court, and direct the trial court to comply with the provisions in question, or act in terms of Section 113.

- [12] The DDP did not address the issue of the previous convictions of the accused being considered by the trial court.
- [13] I direct therefore that the trial court cannot take notice of any previous convictions of the accused not formally proven by the state against the accused.

I therefore make the following order:

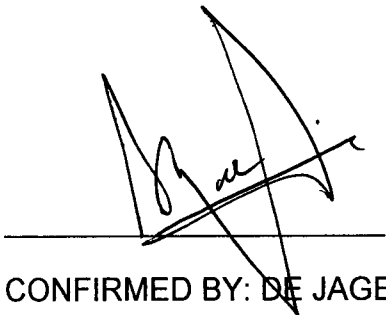
- 1. The conviction and sentence is set aside**
- 2. The matter is referred back to the trial court.**
- 3. The trial court is ordered to question the accused in accordance with Section 112 (1) (b) of the CPA, and with due regard to the cases of *Mudau, Mkhize and Witbooi*.**
- 4. The trial court in the event of finding the accused guilty should not have regards to any previous convictions, and treat the accused as a first offender, unless such previous convictions are proven by the state.**
- 5. On date of sentencing the accused, in the event of conviction, the trial court should have regard to the incarceration of the accused since 24 June 2014, and this should be reflected in the sentence imposed.**

SO ORDERED.



S STRAUSS,
ACTING JUDGE OF THE HIGH COURT

I agree,



CONFIRMED BY: DE JAGER NF
ACTING JUDGE OF THE HIGH COURT