

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

Supreme Court No. 50/2015

In the matter:

THE STATE

and

VUZIWA MABABSO

Accused

CORAM: LEKALE, J *et* MIA, AJ

JUDGMENT: MIA, AJ

DELIVERED ON: 23 APRIL 2015

- [1] This matter comes before us on review in the normal course in terms of section 302 of the Criminal Procedure Act 51 of 1977 from the Magistrate, Ladybrand. The accused was charged with possession of 10.1kg of dagga and convicted. The sentence imposed was three thousand rands or six months imprisonment. The accused was not declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000. The dagga was declared forfeited to the State.

- [2] Upon perusing the record it is evident that the accused was arrested on the 16 February 2015 and appeared on the 17 February 2015. Her right to legal representation was explained and the question was posed, “Do you want legal aid?”. The record reflects that she replied “YES” in response to the question. The record reflects further that it was “REFERRED TO LEGAL AID OFFICER” as was appropriate to do under the circumstances. However the record is unclear with regard to the further proceedings in court and it appears the matter was postponed to 19 February 2015. The Magistrate made use of a preprinted form with predetermined options, presumably to expedite proceedings. This created confusion in the record as the options not applicable to the proceedings under paragraph 3 have not been deleted and the record reads as follows:

“REMAND (where bail application as stated in 4 below is not held).

ACCUSED IN CUSTODY.

This case is postponed to 19/2/2015 Court:

- Legal Aid/Attorney
- Further Investigation
- Plea and Trial
- Accused warned for 08:30(Bail extended)
- Accused in custody-section 50(6) Act 51/1977

- Accused in custody of guardian
- Accused warned for 08:30
- OR
- For finalization see J15. Mechanical Recording”

[3] It is not evident from the record that the question of bail was addressed on the first appearance or at all. Section 60 of the Criminal Procedure Act 51 of 1977 provides:

“ 60(1)(a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6) be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

....

(c) If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court.” (my emphasis)

[4] The Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) provides in section 35 that:

“35 (1) Everyone who is arrested for allegedly committing an offence has the right—

(a)...

.....

- (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
- (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (2) Everyone who is detained, including every sentenced prisoner, has the right—
 - (a) to be informed promptly of the reason for being detained;...”

[5] The record does not reflect that the accused was informed that she could apply to be released on warning or on bail with conditions attached if necessary as provided in terms of section 60(1)(c) of the Criminal Procedure Act 51 of 1977 and embodied in section 35 of the Constitution. She was not informed of her right to be released or the reason for her continued detention as required in terms of section 35 of the Constitution.

[6] A further first aspect that gives cause for concern about whether the proceedings were in accordance with justice is the accused's right to be legally represented. It is not evident from the record why the accused was not legally represented after she indicated that she wanted a legal aid attorney. The right to legal

representation is protected in the Constitution in section 35 which provides:

“35. (2) Everyone who is detained, including every sentenced prisoner, has the right—

(a)....

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(3) Every accused person has a right to a fair trial, which includes the right—

(a) ...

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;”

- [7] On the 19 February 2015 the record indicates the accused appears in person and the prosecutor informs the Court that the matter is on the roll for a plea. It is not apparent what occurred in the interim that led to the accused appearing in person after the referral to legal aid. The reason why the matter proceeded without the assistance of a Legal Aid attorney is simply not

apparent from the record. The matter proceeded nonetheless with the accused appearing in person without her right to legal representation as provided in section 35 of the Constitution being given effect to. Both the accused's rights to be informed that she may apply to be released on bail or warning if the interests of justice so permit and to legal representation were not given effect to which events leave no doubt that the proceedings were not concluded in accordance with justice.

- [8] The accused pleaded guilty to the charge of possession of dagga. In response to the question whether the accused was aware that it was an offence to possess dagga in South Africa, she initially responded that she was not aware that it was an offence. The question is repeated at the request of the accused and she responds in the affirmative and is convicted.
- [9] The accused is informed that she may give evidence in mitigation and call witnesses or give evidence from where she stands. The court explains:

“Now you have been found guilty you have the right to mitigate. You can do so by giving evidence under oath, you can do so by giving evidence where you stand. The difference will be that if you give evidence under oath and may cross examined by the State and you have the right to call witnesses in mitigation of your sentence.”

- [10] There is no explanation that the Court will attach less weight to the accused's address from the accused dock as the information is not given under oath. The difference between the two forms in which the accused may place information about their personal circumstances before the court is the value attached to the information furnished. The evidence being given under oath naturally has more weight attached to it.
- [11] The personal information which the accused placed before the court in summary was that she was 23 years old at the time of the offence, was not married, she had a minor child aged one year and six months old and was unemployed. She also appealed for the Court's mercy indicating that she left the minor child with her father who was sickly. No further questions were put to the accused to clarify this aspect of the care of the child. No questions were put to the accused regarding her ability to source funds to pay a fine. The record reflects that the accused was not released, did not pay the fine at court or at prison.
- [12] Whilst the offence is a serious offence and one that may be prevalent in the jurisdiction the Court serves, it is trite that the punishment must fit the crime and this must take account of all the factors relevant to sentencing such as the accused's personal circumstances, the offence as well as the interests of

the community. The accused was clearly not in a position to pay a fine immediately and this was evident as she informed the Court that she was unemployed. There was no attempt to ascertain whether she could access money to pay the fine or to make an arrangement to pay the fine in view of her statement that her minor child was left with her sickly father.

- [13] The record reflects that after pronouncing the sentence the magistrate informed the accused that if she was not satisfied with the conviction and sentence she had a right to appeal within 15 days from the date of sentence. Once again there was no reference to Legal Aid or referral to Legal Aid to assist the accused. The accused's response at the conclusion of the proceedings was:

“ACCUSED: Your worship, I would like to ask? I have a comment I would like to ask something, your worship?”

COURT ADJOURNS

The record ends at this point without an indication that the accused was permitted to address a question which might have been related to the proceedings. At this point questions could have related to clarity on the right of appeal that had been explained, to being afforded an opportunity to pay off the fine or to assistance in relation to the appeal. It is also evident that whilst the accused was informed of her right to appeal, she was

not informed that the record of the proceedings would be sent on review and that she was entitled to cause written comments to accompany the record.

[14] It is appreciated that the magistrates' courts receive many matters to attend to and that forms may well assist in expediting matters. However expediency can never yield to the right to apply for bail, to be informed of this right, to be informed of the reason for one's continued detention, the right to legal representation, especially where this has been requested by the accused and the right to be informed of review proceedings and the opportunity to submit comments. Expediency can never yield to the right to have one's proceedings conducted in accordance with justice. In view of the numerous issues highlighted above I am unable to conclude that the proceedings were conducted in accordance with justice.

[15] For the reasons indicated above I propose the following order:

1. The conviction and sentence are set aside.
2. The accused is to be released forthwith.

S.C. MIA, AJ

I agree and it is so ordered.

L.J. LEKALE, J