

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Review Number: 158/2015

In the review between

THE STATE

and

NTEBELANG AMELIA MOKHÁTI

CORAM: JORDAAN, J *et* OPPERMAN, AJ

DELIVERED: 18 NOVEMBER 2015

- [1] On 28 July 2015 the accused was arrested for the illegal dealing in 16, 40 kilograms of dagga in contravention of the *Drugs and Drug Trafficking Act 140 of 1992*. She appeared before court the next day, was convicted after a plea of guilty in terms of section 112(1)(b) of the *Criminal Procedure Act 51 of 1977* and sentenced.
- [2] The sentence of R3000-00 or 12 months imprisonment and an additional 18 months imprisonment which was wholly suspended, brings the matter on review.
- [3] As on the 12th of August 2015, the date the review was submitted to the High Court, the accused was in custody and had therefore not been able to pay the fine.

[4] The then Judge of Review returned the matter to the Magistrate with the following observations:

"1. It appears that the accused alleged that a 3rd person asked her to fetch and deliver the dagga to her for which services she would be paid a R1000-00.

In view of that:

- a) On what basis was the court satisfied that she knew that what she was doing may amount to dealing in dagga?
 - b) On what basis was the court satisfied that she was indeed aware of the fact that what she was doing may amount to unlawful dealing in dagga?
2. It should appear from the record that the accused rights to legal representation have been explained. A mere note by the presiding officer that it has been done is insufficient.
 3. In regards to the sentence it appears that the accused earned some income from doing piece jobs. Why was the average amount of monthly income not ascertained especially in view of her ability to pay a fine?"

[5] The response of the Magistrate did not resolve the concerns of the reviewing Judge. It reads as follows:

"1. The accused was asked by another lady to fetch dagga from Zone 2 and was promised R1000-00 as payment. No 3rd person involved.

- a) The court was satisfied that she knew that what she was doing may amount to dealing because she fetched the dagga and was to leave the dagga in Bloemfontein. She was going to transport dagga.
 - b) The accused admitted that her actions were unlawful and she knew that it is an offence to be dealing in dagga.
2. The accused rights to legal representation were explained before the case went on record. The Magistrate erred for not explaining again for record.
 3. It was an oversight for the Magistrate not to ascertain the average amount of monthly income.

The case is referred back to the Honourable Judge for your direction and further comments.”

[6] Review of the proceedings brings issues of fair trial and procedural flaws to the fore.

- a) The record does not reflect the rights to legal representation that were explained to the accused.
- b) The court *a quo* did not explain the provisions of section 112(1)(b) of the CPA properly. The questioning in terms of the section does not comply with principles fixed in precedent. The sum total of the explanation is:

“The Court is going to ask you some questions to determine whether you are pleading guilty correctly . . .”

The law is clear on this issue and much have been declared in courts and academic research. This judgement will not repeat it. (2015: Du Toit *et al*, Commentary on the Criminal Procedure Act, section 112, 2015: Hiemstra’s Criminal Procedure, section 112.)

- c) Added to the above, the definition of ‘dealing’ in terms of the *Drugs and Drug Trafficking Act 140 of 1992* was not explained to the undefended accused. It cannot be presumed that an accused knows that to carry dagga from one location to another implies dealing in drugs in terms of the law.
- d) The questioning consisted of the following: "Do you also confirm that, do you know that dagga is an undesirable dependence producing substance?" The accused is an uneducated lady that does laundry for a living. It should never have been assumed

that she knows the meaning of “an undesirable dependence producing substance.”

- e) The court did not obtain good and sufficient information before sentence. The financial circumstances of the accused were not established. The accused did not pay the fine. The fine may not be just. The statement of the Supreme Court of Appeals in **S v Samuels 2011** (1) 9 (SCA) at [8] that sentencing is a judicial function *sui generis*, is supported.

“In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.”

- f) Some of the evidence that was obtained was not considered. For instance, the accused informed that she has two children of 5 and 2 years old respectively. She added: “They are supported by me, Your Worship and right now they are left with my mother who is sick, Your Worship with stroke.” The best interest of the child-principle in terms of section 28(2) of the *Constitution of the Republic of South Africa, 1996* (the Constitution) should have been, at the least, explored and contemplated.
- g) The judgment on sentence was rushed. It lacks substance. The declaration that: ‘dealers do not discriminate to whom they sell dagga, they even sell it to young kids’, does not fit the facts of this case. In **S v Immelman** 1978 (3) SA 726 (A) at 729B-D the following was said in respect of sentence:

‘It seems to me that, with regard to the sentence of the Court in cases where the trial Judge enjoys a discretion, a statement of the reasons which move him to impose the sentence which he does, also serves the interests of justice. The absence of such reasons may operate unfairly, as against both the accused person and the State. One of the various

problems which may be occasioned in the Court of Appeal by the absence of reasons is that in a case where there has been a plea of guilty but evidence has been led, there may be no indication as to how the Court resolved issues of fact thrown up by the evidence or on what factual basis the Court approached the question of sentence.

- h) The inquiry in terms of section 103 of the *Firearms Control Act 60 of 2000* was not conducted at the correct stage of the proceedings and reasons were not given for the finding. The court's determination as to fitness should not be made separately before sentencing as the information relevant to such fitness may emerge during the investigation into mitigating circumstances. **S v Van Dyk** 1991 (2) SACR 48 (W) and **S v Phuroe** 1991 (2) SACR 384 (NC). The sentence may determine the applicable law. A formal inquiry must be conducted after sentence with resultant judgement. **S v Smith** 2006 (1) SACR 307 (W).
- i) The rights to appeal, application for leave to appeal and review were also not explained properly. The record speaks for itself.

[7] The right to a fair trial is stipulated in section 35(3) of the Constitution. The first and foremost principle in a criminal trial is that the procedure should be adversarial and each party must fully participate in the proceedings. Participation involves real insight and understanding of the law. It is trite that undefended accused must be informed of the relevant law and the record must reflect the explanations; the explanations must be all-inclusive and clear. This is elementary justice and due process; the cornerstone of the fair trial-principle.

- [8] Section 4(1) of the Magistrates Court Act 32 of 1944 states that: "Every court shall be a court of record." A fair trial cannot ensue without records. Records, and the information they contain, are a valuable asset in a democratic society and the judicial system. Records provide essential evidence as to whether justice was served. Without reliable records, justice cannot be administered. The lack of veracity of presiding officers to keep proper records in court proceedings is inexcusable and irregular.
- [9] In S v Filani 2012 (1) SACR 508 (ECG) on 516 it was pointed out that judicial officers are human: they all make mistakes of law and fact from time to time hence the necessity for appeal courts. Lately and in this case it must be added to the above that the possible duress for statistical targets and the preponderance of certain crimes may not upset the independence and accountability of the presiding officer. Justice must be served without fear, favour or prejudice.
- [10] There is a minimum non-negotiable standard. The least that can be expected of the presiding officers is that they apply themselves diligently and conscientiously to the cases before them, conscious at all times of their weighty responsibility to administer justice fairly to both the State and the accused who appear before them.

[11] The principles that was set out in **S v Kester** 1996 (1) SACR 461 (B) must be common practise in courts of law in South Africa.

"(1) *The record must indicate and prove*, where an unrepresented accused is involved in a criminal trial, whether or not his/her rights were explained to him/her in a proper manner, and that he/she understood the position.

(2) When explaining the position, a Magistrate should sedulously inform the accused and *confirm that the accused understands* that he/she is entitled in an appropriate case, to close his/her case without leading any evidence or to apply for his/her discharge.

(3) It is a salutary practice that the explanation of the rights of the accused by the presiding officer should appear on the record with *adequate and satisfactory particularity to enable a judgment to be made on the adequacy thereof*.

(4) The aforesaid duty resting upon a Magistrate cannot and should not be delegated. *It is the duty of the Magistrate*.

(5) If roneod forms are used, care should be taken to ensure that the said forms contain all the necessary explanations, together with the import thereof. In some cases, an accused has to be informed of special defences and presumptions. The court must also be alerted to, and cognizant of the fact, *that the circumstances of a case may require that more be explained to an accused by the Magistrate than what is contained in the said roneod form*.

(6) Generally, a presiding officer should assist an unrepresented accused in the conduct of his case, and must strive to ensure that the said *accused is at ease and is able to present his case to the best of his ability*. Mere lip service to the duty will not suffice." (Emphasis added)

[12] Not all irregularities are fatal and will lead to the setting aside of the proceedings. Dealing with automatic review does not require the Judge to certify that the proceedings are in accordance with law but in accordance with justice. **S v Ndlovu 1998** (1) SACR 599 (WLD) on 601.

[13] In this matter there was a complete failure of justice *per se*. The principles declared in **Key v Attorney-general, Cape Provincial Division and another** 1996 (4) SA 187 (CC) at [13] is applicable here. The Constitution demands that the accused be given a fair trial. This does not mean sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious stratagems; it simply requires that justice be done.

[14] It is ordered that the conviction and sentence be set aside.


M. OPPERMAN, AJ

I concur


A.F. JORDAAN, J