

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

Special Review No. : 55/2014

In the special review between:-

THE STATE

versus

ZAKHENI YAWA

CORAM: VAN ZYL, J et DAFFUE, J

JUDGEMENT BY: VAN ZYL , J

DELIVERED ON: 12 MAY 2014

- [1] This is a special review in accordance with the provisions of section 304(4) of the Criminal Procedure Act, 51 of 1977 ("the Act").
- [2] Mr S.F. Ferreira, the Senior Magistrate, Welkom, set out the relevant facts in a clearly written, detailed letter addressed to the Acting Judge President of this Court. I therefore deem it apposite to quote from the contents of the said letter when dealing with the different aspects of this matter.

BACKGROUND:

[3] The following background is set out in the said letter:

“The above-mentioned accused was convicted during an enquiry in terms of Section 170 (2) of the Criminal Procedure Act, Act 51 of 1977, into his failure to appear at one of the district courts on 20 November 2013. The accused was then cautioned and discharged.

On 14 January 2014 the accused paid an admission of guilt fine on the main charge of contravening section 2(1) of the Dangerous Weapons Act, Act 71 of 1968.

The matter was brought under my attention after a complaint was received about the manner in which the magistrate had conducted the enquiry. The case record was transcribed and a copy was handed to the presiding officer who had disposed of the enquiry. She was asked to comment on:

- a) Whether the accused was properly informed of his rights before commencing with the enquiry.
- b) The manner in which the enquiry was done.

The magistrate fell ill afterwards and eventually declined to give any further comment.”

THE SECTION 170(2) ENQUIRY:

[4] With regards to the enquiry in terms of Section 170(2) of the Act, the following facts are correctly stated in the letter of Mr Ferreira:

“EXPLANATION OF ACCUSED RIGHTS

On 29 October 2013 the accused was informed of his right to legal representation upon his first appearance and elected to apply for legal aid, which was granted. The case was remanded to 19 November 2013 for trial. On 19 November 2013 the accused failed to appear at court and the legal aid attorney requested to withdraw from record. A warrant was authorized for the accused's arrest. The accused subsequently appeared the next day and his right to legal representation according to the case record was explained as follows:

'Right explained for warrant arrest enquiry-accused elect own defence.'

However when perusing the transcription, which is attached, I could not find that the accused's right to legal representation was explained to him again and that he elected to proceed in person. It will be apparent from the recording that the recording commenced from the time the court started in the morning. The applicable part of the proceedings commences on line 14 of page 7 of the transcription.”

For the sake of clarity, I may mention that the alleged explanation to the accused pertaining to his right to legal representation on 20 November 2014 as quoted above by the learned Magistrate, is only reflected in the handwritten part of the case record. It is not reflected in the transcription of the record despite the fact that, as again correctly pointed out by Mr Ferreira, the transcription clearly covers the totality of the day's proceedings in court.

The letter then continues:

‘The following explanation was then given to accused (line 17):
 ‘If I find that your failure to appear was due to your own fault, I am going to fine you or alternatively send you to three months imprisonment. The test is simple; the test is whose fault is it that you failed to appear here in court. You have the right to call witnesses. You and your witnesses will be subject to cross-examination. You can convince the court or prove to the court that your failure to appear was not due to your own fault by testifying under oath, alternatively bringing an affidavit, which is also a statement under oath. You also have a right to remain silent.’

The accused thereafter chose to testify under oath.

Case law:

The constitutionality of the onus placed on an accused person was discussed in the case of: **S v Singo 2002 (2) SACR 160 (CC)**. The court found that the reverse onus was inconsistent with the right to be presumed innocent and that an accused person merely has to satisfy the court that there is a reasonable possibility that his failure was not due to fault on his/her part.

The procedure to be followed by a magistrate in conducting such an enquiry is discussed in length by the learned Judge in paragraph 11 to 13 of the judgment. From this it transpired that the magistrate had failed to inform the accused that prima facie the proceedings indicate that he was warned to appear at a certain time and date and that he had failed to appear and to challenge the prima facie evidence, not to give self-incriminating evidence and what the consequences of remaining silent will be.

It was also not explained to the accused that he only has to satisfy the court that there is a reasonable possibility that his failure was not due to fault on his part.

FAIRNESS OF THE PROCEDURE:

The fairness and impartiality in which to conduct the enquiry is also discussed in length by the learned Judge in paragraph 13 of the judgement. The learned Judge remarked as follows:

‘The enquiry must be conducted in a fair and impartial manner. As part of the enquiry, the presiding officer must establish from the accused whether he or she disputes the fact that he or she was duly warned, giving the details of the warning as recorded, and that he or she has failed to comply with the warning. If the accused does not dispute the two basic facts, the presiding officer must then establish from the accused the reason for his failure to appear in court. Fairness requires the presiding officer to assist an undefended accused to explain his or her failure to appear in court by putting questions to the accused. By its very nature, the enquiry envisaged in section 72(4) appears to contemplate that the presiding officer will play an active role in such enquiry by putting questions to the accused. The objective of such questions is to elicit the explanation, if any, for failure to appear in court. **Provided that the questioning is conducted in a fair and impartial manner, this will help an undefended accused to put forward the reason for his or her failure to appear in court.**’

It is regrettable to note that this was not done. The questioning by the magistrate commences on page 11 paragraph 15 and led up until page 18 paragraph 5. The record speaks for itself and

the side remarks made cannot be condoned. It is therefore doubtful whether the enquiry was done in an impartial manner.

...

The learned Judge is hereby respectfully requested and without being prescriptive to set aside the conviction and sentence on contravening Section 170(2) of Act 51 of 1977..."

- [5] I am in total agreement with Mr Ferreira's very competent exposition of the relevant facts as well as the applicable legal principles, as well as his inferences drawn therefrom.
- [6] The manner in which the presiding Magistrate dealt with the aforesaid enquiry is, to say the least, shocking, totally unacceptable and constitutes a travesty of justice. Her subjective, sarcastic and irrelevant remarks throughout the enquiry are uncalled for and improper and such conduct is unbecoming of any presiding officer in a court of law.
- [7] The lack of impartiality on the side of the presiding Magistrate and the unfair manner in which the enquiry was conducted, have the result that the proceedings were not in accordance with justice. It should therefore be set aside. The accused's right to a fair enquiry has in my view been tainted to the extent that it cannot even be corrected by starting the enquiry *de novo*.

PAYMENT OF THE ADMISSION OF GUILT:

- [8] The letter of Mr Ferreira details the relevant circumstances regarding this issue as follows:

“2) PAYMENT OF ADMISSION OF GUILT

The amount of R50-00 admission of guilt was fixed by the prosecutor on 14 January 2014 which the accused subsequently paid on the same day. The admission of guilt was fixed for an offence of being in possession of a dangerous weapon in terms of section 2(1) of the Dangerous Weapons Act, Act 71 of 1968. This act was however repealed on 2 January 2014 and substituted with Act 15 of 2013. Another magistrate confirmed the admission of guilt in terms of section 57(7) of Act 51 of 1977, although it was not noted on the control document but indeed on the admission of guilt classification report.

In terms of section 2(1) of Act 71 of 1968 the onus of proving absence of unlawfulness rests on the accused who must prove **'that he at no time had any intention of using such weapon or object for any unlawful purpose....'**

Section 3(1) of Act 15 of 2013 stipulates that **'any person who is in possession of any dangerous weapon under circumstances which may raise a reasonable suspicion that the person intends to use the dangerous weapon for any unlawful purpose....'**

In **S v Magwaza 1976 (4) SA 281 (N)** the court decided that it becomes important to ensure that the accused is adequately warned that he is entitled to an acquittal if he can show absence of unlawful purpose. Many accused plead guilty or admits guilt notwithstanding absence of intention to use the weapon for any unlawful purpose. Upon payment of admission of guilt the

accused person was not accordingly informed. It appears in terms of the new act that an accused person should also be informed that the state must prove that there are circumstances which may raise a reasonable suspicion that he/she intends to use the dangerous weapon for an unlawful purpose. Guidance is however sought as to whether it is appropriate to fix an amount of admission of guilt for an offence committed in contravention of the new act.

The learned Judge is hereby respectfully requested and without being prescriptive ... to set aside the confirmation of the admission of guilt in terms of section 57(7) of Act 51 of 1977 and to order that the amount of R50 be paid back to the deponent.”

- [9] It is evident from the charge sheet that the accused was charged with having been in possession of the relevant dangerous weapon on or about 19 October 2013, at which date Act 71 of 1968 was still in force. However, the confirmation of the admission of guilt should still be set aside as it appears that the accused was not warned that he is entitled to an acquittal if he can show absence of an unlawful purpose.
- [10] Mr Ferreira is correct in pointing out that Act 15 of 2013 also contains provisions which necessitates that the state will have to prove the circumstances which raise a reasonable suspicion that the accused intended to use the object as a dangerous weapon for an unlawful purpose. In this regard Section 3(2) determines as follows:

“(2) In determining whether a person intends to use the object as a dangerous weapon for an unlawful purpose, all relevant factors, including but not limited to, the following must be taken into account:

- (a) The place and time where the person is found;
- (b) the behaviour of the person, including the making of any threat or the display of intimidatory behaviour;
- (c) the manner in which the object is carried or displayed;
- (d) whether the possession of the object was within the context of drug dealing, gang association or any organised crime or any other criminal activity; or
- (e) any other relevant factors, including any explanation the person may wish to provide for his or her possession of the object: Provided that this paragraph shall not be interpreted as an obligation on the person to explain his or her possession of the object.

[11] It consequently appears that the principles enunciated in **S v Magwaza** will probably be *mutatis mutandis* applicable to the new act. I however suggest that the issue pertaining to the appropriateness of fixing an amount of admission of guilt for an offence committed in terms of the new act be referred by the learned Senior Magistrate to the Director of Public Prosecutions.

ORDER:

[12] I consequently make the following order:

1. The conviction and sentence on contravening Section 170(2) of Act 51 of 1977 are set aside and the accused is acquitted.
2. The conviction and the confirmation of the payment of the admission of guilt fine on a charge of contravening Section 2(1) of the (now repealed) Dangerous Weapons Act, 71 of 1968, are set aside and it is ordered that the fine in the amount of R50.00 forthwith be paid back to the accused.

C. VAN ZYL, J

I concur.

J.P. DAFFUE, J