

Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE DIVISION, KIMBERLEY]

CASE NO: 71/2014

Date of the judgment: 17 November 2014

In the Review of:

THE STATE

And

PATRICK ELRICO VISAGIE

THE ACCUSED

Coram: *Phatshoane J et Pakati J*

JUDGMENT

Phatshoane J:

1. This matter came before us for automatic review. The accused, a juvenile aged 17, appeared before a Regional Court Magistrate, Ms Ditse, in Kimberley, on a count of robbery with aggravating circumstances as contemplated in s 1 of the Criminal Procedure Act, 51 of 1977, (the CPA).
2. The accused pleaded guilty. In his statement in terms of s 112(2) of the CPA he intimated, *inter alia*, that he and a certain lady arranged to rob the complainant. He explained that while the complainant was in his vehicle with this lady he approached them, opened the vehicle's right rear door and got inside. He threatened the occupants with a single blade of a sheep shear fashioned into a

weapon. He demanded money and a cellular phone from the complainant which items were handed over to him. He took out R340 from the complainant's wallet, ordered him to alight the vehicle and drove off in the complainant's vehicle with the lady in question. At Shoprite Store in town he abandoned the vehicle. He and the lady parted ways and he never saw her again.

3. The accused was convicted of robbery with aggravating circumstances on the basis of his plea. His conviction cannot be faulted.
4. During the pre-sentencing procedures it became apparent that the accused had a previous conviction described in the pre-sentencing reports as "Hijacking and kidnapping". It also appears from some of these reports that on 05 February 2014 he was sentenced to five years imprisonment for the latter offence. Little is being offered about the nature of this five year jail term. For example whether any portion of the sentence was suspended and the conditions thereof.
5. On 19 August 2014, for the current offence, the Magistrate sentenced the accused to five years imprisonment in terms of s 77 of the Child Justice Act, 75 of 2008. The sentence was antedated to 11 April 2013 because he had been in detention since then. In addition it was ordered that this sentence run concurrently with the sentence the accused was serving in respect of the "hijacking and kidnapping" offence.
6. When handing down her sentence the Magistrate made a remark that the accused's attorney had mentioned that the accused had a previous conviction. Be that as it may, she proceeded to state that she would treat the accused as a first offender because the prosecution did not adduce proof of the accused's previous criminal record.
7. On 15 September 2014 I directed a query to the learned Magistrate in which I requested her: (1) to provide the basis upon which the previous conviction(s) of the accused were not proved; and (2) to state reasons whether she did not consider it her duty to call the prosecutor to adduce proof of the accused's previous conviction before the commencement of the sentencing procedures. In her reply

the Magistrate acknowledged that it was an oversight on her part not to request the State's counsel to adduce proof of the accused's previous convictions before the sentencing procedures.

8. I share the views expressed by Spilg J in *S v Nhlapo* 2012 (2) SACR 358 (GSJ) at 364 paras 19 and 20:

"[19] Section 274(1) of the CPA provides that 'a court may . . . receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.'

[20] It is trite that the imposition of a proper sentence requires a consideration of the triad of factors, one of which is the public interest. Accordingly, irrespective of whether the offence is one subject to the minimum-sentence regime under s 51 of the Criminal Law Amendment Act 105 of 1997 (CLAA) or not, public interest cannot be properly considered and weighed unless a court is apprised of whether the offender has previous convictions, and, if so, for what."

At para 32 the learned judge proceeds:

"[32]....Whatever the prosecutor's reason for not securing a SAP69 it appears necessary, not only where s 51 of the CLAA is invoked **but also to ensure generally that the interests of society are properly taken into account, for the state to produce a SAP69 in court and that a presiding officer insist on its production in order to properly discharge the sentencing functions under law** (see further *Sethokgoe* at 545i – 546b), unless good reason exists to avoid a further remand where the offender is to remain in custody." (My emphasis)

9. In the exercise of the Court's duty to ensure a fair trial, it is necessary to balance the rights of the accused, the rights of the victim and society at large. See *S v Thebus and Another* 2003 (2) SACR 319 (CC) at 367 para 109.
10. I am unable to discern why the production of the accused's previous convictions was not done in this case. The Magistrate's procedural approach is conflictual and confusing. In one breath the accused's current sentence is to run concurrently with an existing (previous) sentence. On the other hand the accused is treated as a first offender. This cannot be. In *S v Joaza* 2006 (2) SACR 296 (T) at 297 Patel J lucidly puts it as follows:

"If persons are simply regarded as first offenders and receive lenient sentences then the administration of our criminal justice system will invite societal disdain. Although it is at the discretion of the prosecution to place the list of an offender's previous conviction before

the court, I am of the view that it is prudent to do so in every case, thereby ensuring that the offender is rightly and judiciously sentenced. Let it be said that in this age of advanced information technology, any person's previous convictions can easily and swiftly be obtained from the South African Criminal Bureau data bank. Therefore, there is no excuse why the prosecution should omit to furnish a recordal of previous convictions to the sentencing court."

11. In the pursuit of justice, Prosecutors play a significant role in placing information before the Court that ought to assist it in arriving at a just decision in a case. Equally true is that the Presiding officers play an important part in dispensing justice. As was said by Curlewis JA in *R v Hepworth* 1928 AD 265 at 277:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

12. Emanating from the foregoing it is evident that the Regional Magistrate committed a gross-irregularity in the sentencing procedure, which must be set aside and be revisited. Whereas the emphasis should be on the accused's previous convictions, it should be left open to the defence or the State to present whatever evidence they deem relevant and necessary. It is important to have proper regard to the accused's youthfulness and to consider his propensity to commit serious violent crime which ought not to be underemphasized, if he has a previous conviction.
13. In the result the following order is made:

Order:

1. The conviction is in order.

2. The sentence is set aside and the case is remitted to the Regional Magistrate, Ms Ditse, to assess and impose the sentence afresh.

Phatshoane J

I concur

Pakati J