



IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

High Court Ref: **0501769**

Magistrate's Court Ref No: **66/05**

In the matter between:

THE STATE

vs

WILLIAM ESPOSITO

Coram: Yekiso et Ndita JJ

Delivered: 31 October 2006

Summary:

Admission of guilt

Deemed conviction in terms of Section 57(6) of the Criminal Procedure Act, 51 of 1977

Review thereof – approach to be adopted – whether, on consideration of equity and fair dealing, accused could be said to have arguable defence

- Since it could not be ascertained if accused informed of his constitutional rights in terms of Section 35(1) and 35(2) of the Constitution of the Republic of South Africa, 1996 consideration of equity become paramount

- Since it could not be ascertained if evidence not illegally obtained, held that accused has an arguable defence

Admission of guilt set aside – fine paid ordered to be refunded to the

accused

REVIEW JUDGMENT DELIVERED: 31 OCTOBER 2006

YEKISO, J

[1] This matter relates to the review of payment of admission of guilt fine. It is submitted for special review in terms of section 304(4) of the Criminal Procedure Act, 51 of 1977 by the magistrate, Cape Town.

[2] On basis of the documentation contained in the case file submitted for review, it appears that the accused was issued with a written notice to appear in the magistrate's court, Cape Town. The written notice was issued in terms of section 56 of the Criminal Procedure Act. The notice was issued on 18 July 2003. In terms thereof the accused was required to appear in the magistrate's court, Cape Town on 6 August 2003 to answer a charge of contravening the provisions of section 4(b) of the Drugs and Trafficking Act, 140 of 1992. The allegation against the accused was that on 17 July 2003 and at or near Curtis Street, Cape Town, the accused was found to be in possession of a small quantity of dagga, ostensibly without being issued with a permit to possess such prohibited substance. The notice made provision for payment of admission of guilt fine in an amount

of R 300-00. On basis of the admission of guilt receipt issued at the charge office, S A Police Service, Cape Town, it appears that the accused paid an admission of guilt in the said sum of R 300-00.

[3] Once the accused had paid the admission of guilt fine, the control document, which ostensibly is in the same format as the written notice to appear in court, was forwarded to the clerk of the court, magistrate's court, Cape Town who, in turn, entered the particulars of the charge and the admission of guilt in the criminal record book for admission of guilt matters. Once that had happened, the accused was, in terms of section 57(6) of the Criminal Procedure Act, deemed to have been convicted and sentenced in the magistrate's court of the offence with which he was charged. Subsequent thereto, and as a matter of routine, the matter was considered by the magistrate in terms of section of section 57(7) of the Criminal Procedure Act to determine if the process leading to the admission of guilt, and the amount determined for payment of admission of guilt fine was in accordance with justice. It appears on basis of the documentation inside the case file for review that the magistrate was satisfied that the conviction and sentence, based on payment of the admission of guilt fine, was in

accordance with justice. The accused was then deemed to have been duly convicted in terms of section 57(6) of the Criminal Procedure Act. Once the magistrate had determined that the process leading to the payment of admission of guilt fine was in accordance with justice, he made the necessary endorsement on the prescribed form and, from then on, the magistrate became *functus officio*.

[4] A while later, and this appears to have been on 2 September 2004, the accused deposed an affidavit stating that he is not guilty of the offence for which he had paid an admission of guilt fine. In the same affidavit he describes, in minute detail, the circumstances surrounding his arrest and subsequent detention in the police holding cells, culminating in the payment of the admission of guilt fine on 18 July 2003. In the sub-paragraphs which follow are the salient features of events stated in the accused's affidavit:

[4.1] On 17 July 2003, at approximately 10h00 in the forenoon, the accused was in company of four of his friends, Lucky, Tshepo, Clifford and Tsepiso. At the time all of them were students at the University of Cape

Town. He states that they were standing on the pavement next to his motor vehicle, a two door Ford Fiesta which was parked in the parking lot situate close to the Mount Nelson Hotel.

[4.2] Whilst they were standing on the pavement, the accused noticed three members of the Cape Town City Police approaching them. They were on foot patrol. As the police approached them, one of his friends, Clifford, threw an object underneath a motor vehicle parked next to his motor vehicle. The police must have seen this happen for one of them went to this other motor vehicle and retrieved the object from underneath it.

[4.3] On being questioned by the police, Clifford admitted that he had thrown the object underneath the car. It transpired that the object thrown underneath this other vehicle contained a small quantity of dagga. All of them were thereafter searched. Asked by the police whose vehicle it was next to which they were standing, the accused admitted that it belonged to him. Further asked whether or not there were any illegal substances in his motor vehicle, the accused replied in the negative. He states further in his affidavit that soon thereafter, the police, without his consent, proceeded to

search his vehicle. One of the policemen emerged with a piece of newspaper in a rolled up form. It transpired that this piece of newspaper also contained dagga. Asked by the police if the dagga belonged to him, he similarly replied in the negative. The accused further states in his affidavit that he did in fact see one of his friends, Tsepiso, throwing the newspaper parcel into his vehicle at the time the police were still approaching them. All of them were there and then arrested and taken to the police station, Cape Town where they were detained in the police holding cells overnight.

[4.4] The accused further states in his affidavit that he had never fell foul with the law in the past and the experience of his arrest and detention was extremely traumatic. Later in the day when the police visited their cell, he together with one of his friends, told the police that the dagga found both beneath the other vehicle and the one inside his vehicle belonged to Clifford and Tsepiso. However, the police ignored them. All of these events took place on Friday, 17 July 2003.

[5] By 09h00 in the morning of Saturday, 18 July 2003, all four of them,

including the accused, were taken to a certain detective Oliver. They were then informed that they would be charged during the course of the weekend, that they would remain in detention for the duration of the weekend and that they were only due to appear in court the following Monday which would have been 20 July 2003. The detective ascertained from them whose dagga it was which was retrieved beneath the vehicle next to his and also the one found in his vehicle. The accused states that he does recall that Clifford and Tsepiso admitted that the dagga belonged to them, but that the police ignored these advices. He states further that the detective explained to him that since the dagga was found in his vehicle, he would be held responsible for it. Ultimately, the detective explained to him that if he agreed to pay an amount of R 300-00 he would be released from custody and no charges would be pressed against his friends. He subsequently arranged with another friend of his who brought the amount of R 300-00 to the charge office which he, in turn, paid to the police to secure his release.

[6] Finally, he states in his affidavit that it was expedient for him to pay the amount of R 300-00 required as the prospect of being detained for the

duration of the weekend was extremely traumatic. He states that no explanation was given to him of the implication of the payment required and, in particular, the fact that he was admitting guilt nor were the consequences of payment of the admission of guilt explained to him. Once the amount of R 300-00 was paid all of them were released from custody. It was only after his release from custody that he became aware of the implication of the payment of an admission of guilt fine. He was advised that by making such payment he in fact admitted guilt and that such admission has the same effect as a conviction in a court of law. It is against the background of what is stated in the accused affidavit that the matter was submitted to this Court for special review with a request that the admission of guilt be set aside and that the amount of R 300-00 paid be refunded to the accused.

[7] Once the case file for the proposed review was received and referred to me for my attention, I addressed a letter to the magistrate, Cape Town directing that he or she ascertain from the case docket if there is any indication if the accused, once arrested, was informed of any one of those cluster of rights contained in sections 35(1) and 35(2) of the Constitution of

the Republic of South Africa, 1996 and in particular if the accused was informed of the following:

[7.1] the right to remain silent;

[7.2] the right to be informed promptly –

- (i) of the right to remain silent and
- (ii) of the consequences of not remaining silent.

[7.3] the right not to be compelled to make any confession or admission that could be used in evidence against him and

[7.4] the right to choose and consult with a legal practitioner.

[8] The magistrate responded and advised that subsequent to the arrest of the accused, no case docket was opened but only the First Information of Crime form was completed; that the specific First Information of Crime form could not be traced; that the police officers who dealt with the accused on arrest have since left the South Africa Police Service and, accordingly, it could not be ascertained if the accused was informed of his constitutional rights in terms of section 35(1) and 35(2) of the Constitution.

[9] On receipt of a response from the magistrate, Cape Town, I

addressed a further letter to the Director of Public Prosecutions under cover whereof was enclosed all the material documentation received from the magistrate and requested a comment from that institution as to whether, in the circumstances of this matter and, assuming the accused's allegations in his affidavit are correct, the accused has an arguable defence and also as to whether, on consideration of equity and fair dealing, the admission of guilt fine should be set aside.

[10] The Director of Public Prosecutions responded per a letter dated 16 January 2006, under cover whereof was enclosed an elaborate and detailed memorandum by *Mr Sidaki*, a senior State Advocate in the office of the Director of Public Prosecutions. I am grateful to *Mr Sidaki* for his detailed and elaborate comment. *Mr Sidaki* holds the view that, on basis of the documentation made available to him, which included the written notice to appear in court on basis of which the accused paid the admission of guilt and also on basis of the affidavit deposed by the accused, his view is that the accused made a "conscious, free and voluntary decision to take responsibility for the amount of dagga found and the payment of the admission of guilt fine and that, in so doing, his erstwhile co-accused escaped liability". *Mr Sidaki*

further comments that there is no indication on basis of the documentation made available to him to suggest that the accused was coerced into admitting guilt.

[11] The approach to be adopted and the principles applied in instances of review of payment of admission of guilt fines have been stated on several occasions and in a number of reported and unreported cases. The reported decisions that come to mind are those such as *S v Marion* 1981(1) SA 1216 (T); *S v Mthiya* 1991(1) SACR 615 (E) and *S v Cedras* 1992(2) SACR 530 (C), to name but few of the decisions pertinent to this point. The approach in dealing with this issue seems to be that the Courts are prepared to come to the assistance of the accused and have had the deemed convictions and sentence set aside in instances where it is evident that the accused could be said to have an arguable defence and that, on consideration of equity and fair dealing, the admission of guilt ought to be set aside.

[12] In *S v Cedras*, supra, Rose-Innes J made the following observation at 531j to 532 a-b:

“In such cases the question must always be whether there are considerations of equity and fair dealing which compel the Court to intervene to prevent a probable failure of justice. There must be evidence before the Court showing the likelihood of such inequity should it not intervene. A Court must be satisfied that the admission of guilt was probably mistaken or incorrect and the accused or other person deposing an oath on his behalf must give a satisfactory explanation as to how the admission of guilt came to be mistakenly or erroneously made. Good cause must be established for condoning the error or mistake in making the admission of guilt. It must be established that, were the charge to go to trial, the accused would have a probable or arguable defence to the charge and that his deemed conviction or sentence is, accordingly, probably not in accordance with justice.”

[13] In *S v Marion*, supra, the Court set aside the deemed conviction on the strength of an affidavit by the accused himself deposing to the facts which indicated that he had probably been wrongly charged. It is always important to bear in mind that the affidavit relied upon clearly establishes a probable defence.

[14] In *S v Mthiya*, supra, it was held that only the Supreme Court (now

the High Court) has the power to set aside the deemed conviction and sentence and that, for this purpose, it is sufficient for an accused to set out, by means of an affidavit or otherwise, sufficient averments which, if true, would raise a reasonable doubt as to the correctness of the deemed conviction. In the matter in point it would appear, on basis of the affidavit deposed by the accused that, once arrested, he was not informed of his rights in terms of sections 35(1) and (2) of the Constitution; that he paid the admission of guilt fine as an expedient and the only way in which he could avoid being detained or kept in custody in the police holding cells over the weekend coupled with the trauma that goes with it. To me this appears to be an acceptable explanation as to how it came about that the accused admitted guilt.

[15] The authorities cited in paragraph [11] of this review were obviously decided before the advent of the Constitutional order. Whereas before 1994 criminal procedure was subject to the sovereignty of Parliament and the whims of the executive, resulting in the oppressive and authoritarian criminal justice system of the apartheid era, the Constitution, protecting the rights of the individual, including those of the accused and convicted

persons, is now supreme. The right to freedom and the security of the person, the right to privacy and the rights of arrested, detained and accused persons place the courts, as guardians of the Constitution, in a pivotal position to prevent abuse of the criminal justice system by the state and to contribute to the development of a fair law of criminal procedure.

(See Nico Steytler: *Constitutional Criminal Procedure* 1998 at p1)

[16] The observations made in the preceding paragraph are appropriate in the matter in point. I have already made a point in paragraph [7] of this review that once the case file for the proposed review was brought to my attention and had read the accused's affidavit, I directed the magistrate to ascertain from the case docket if there is any indication whether the accused was informed by the police of his rights in terms of sections 35(1) and 35(2) of the Constitution. No such indication could be given as no case docket was opened. The First Information of Crime form, which appears to be the only essential document completed after the arrest of the accused, could not be located. The accused states in his affidavit that he was not informed of these rights. In the absence of any clear indication that the accused was informed of his constitutional rights once arrested and

subsequently detained, I cannot just assume that such advice and information was given. This, in my view, strengthens the view that on consideration of equity and fair dealing, the deemed conviction and sentence ought to be set aside.

[17] In making the observations I make in the preceding paragraph I particularly bear in mind that an accused person has a fundamental right to be treated fairly. Fair trial rights would not have been limited to the trial itself if the accused would ultimately have been charged. The right to fair trial is extended to an accused person from the inception of the criminal justice process, which would mean on arrest, until its culmination up to and including the trial itself: as it is often said from the gatehouses of the criminal justice system (that is in the interrogation stage) as well as in the mansions (that is in the trial court). [See also *S v Melani* 1996 (2) BCLR 174 (E) at 188G-F]

[18] In the light of the observations I make in the preceding paragraph, it therefore follows that I do not share the view held by *Mr Sidaki* that the accused made a “conscious, free and voluntary decision to take responsibility for the

amount of dagga found". It is, for an example, arguable that the search of the accused's motor vehicle without his consent and the subsequent discovery of an amount of dagga therein, constitutes illegally obtained evidence which ought to be excluded on the basis that it would render the trial unfair or otherwise would be detrimental to the administration of justice. It therefore follows in my view that the accused has an arguable defence and that, on consideration of equity and fair dealing, the deemed conviction and sentence ought to be set aside.

[19] In the result, I propose making the following order, namely:

[19.1] That the conviction of and the sentence imposed on the accused, pursuant to the provisions of section 57 of the Criminal Procedure Act, be and are hereby set aside;

[19.2] That the particulars relating to the admission of guilt by the accused, and the subsequent payment of the admission of guilt fine, be expunged from the register of previous convictions;

[19.3] That the admission of guilt fine in an amount of R 300-00 be refunded to the accused;

[19.3] This order does not preclude the Prosecution Authorities from

prosecuting the accused in the ordinary course.

N J Yekiso, J

I agree.

T Ndita, J

It is so ordered.