

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA)**

Review Case Number: 426/2023

High Court Ref: 217815

THE STATE

And

MANDISA MACINGWANE

REVIEW JUDGMENT

RUSI J

[1] The accused stood charged with theft in the Mt Fletcher District Court. On 17 January 2024 she was convicted of this charge pursuant to her plea of guilty and was sentenced on the same day. She was legally represented during the proceedings in which she was convicted and sentenced.

[2] This matter comes before this Court on special review as envisaged in section 304(4) of the Criminal Procedure Act 51 of 1977 as amended (the CPA).

[3] For reasons that will become clear in the course of this judgment, it is as well to reproduce the portion of record of the proceedings encapsulating the plea proceedings against the accused, and I do so hereunder:

'PROSECUTOR: The accused is guilty of the crime of theft. In that on or about 24 December 2023. And at or near PEP Store, Mount Fletcher in the district of

Joe Gqabi. The Accused did wrongfully and unlawfully steal, did wrongfully and intentionally steal a pair of a girl's sandal, valued at R70.00. A pair of girl's attire . . . [indistinct] cost R160.00. A pair of ladies' shoes, takkies, costing R200.00. One spray costing R50.00, Your Worship. Apologies for that. The accused had intent to deprive Andiswa of PEP Stores of possession permanently. [sic]

ACCUSED: I understand the charge, Your Worship.

COURT: How are you pleading to the charge laid against you?

ACCUSED: I plead guilty, Your Worship.

[4] Annexed to the charge sheet is a list of the stolen items that was compiled by the police officer and the complainant. The sentence that was pronounced by the court *a quo* during the sentencing proceedings is reproduced in the excerpt below:

' . . . The accused shall be sentenced to six (6) months imprisonment. Wholly suspended for a period of three years if not convicted of a similar offence.' [sic]

[5] The record of the proceedings in the court *a quo* served before me on 30 April 2024 at the request of the Magistrate, Mt Fletcher District Court, for the special review. In the relevant portion of the request of the special review, the Magistrate states as follows:

"1. The accused was not invited to confirm the contents of the Section 112(2) of Act 51 of 1977 Statement after the same was read into the record and the signature thereon.

2. On J15 the sentence is not clear as it reads as follows: Six months imprisonment wholly [sic] for a period of 3 years not committing similar offences.

3. Ex facie the J15 it cannot be concluded that the sentence was suspended. Even the condition of suspension is vague.

4. The direction with regard to filing of the case record is D2 according to the record and ordinarily it was supposed to be D7 if at all the sentence is wholly suspended.”

[6] It is indeed so that when an accused pleads guilty to the charge, it becomes the duty of the court to ensure that he admits all the elements of the offence in question. The court must satisfy itself that the accused’s plea is in accordance with the law – that is to say, he pleaded guilty correctly. This is so whether the accused is legally represented or not. Section 112 of the Criminal Procedure Act 51 of 1977 as amended, governs the procedure followed when the accused pleads guilty. The section provides that:

‘112 (1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea—

(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and—

(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*¹; or

¹ The amount referred to in item (i) is R5 000 per GN R62 in *Government Gazette* 36111 of 30 January 2013.

(ii) deal with the accused otherwise in accordance with law;

(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*², or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.

(3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.'

² R5 000, per GN R62 in *Government Gazette* 36111 of 30 January 2013.

[7] Relevant for the purposes of the present review are the provisions of section 112(1)(b) and 112(2). It is evident from these provisions that uppermost is the court's duty is to ascertain whether the accused admits the allegations in the charge and to satisfy itself as to the guilt of the accused.

[8] On the face of the record of proceedings in the court *a quo*, it does not appear that the accused, whose written statement in support of her plea was read into the record in English, was invited to confirm that what was read by her attorney correctly reflected her admission of all the allegations in the charge against her. Also apparent from the record is that the court and the accused had the benefit of a court interpreter whom I must assume would have interpreted the statement from the language of record to whatever language of the accused's choice.

[9] It must be borne in mind that a statement in support of a plea contains admissions of fact and law which would form the basis of the court's finding as to the guilt of the accused. In as much as the accused was represented by an attorney, it is sound practice, in criminal proceedings to invite an accused to confirm the contents of the plea statement that has been read on record on his or her behalf, and to confirm the fact that he is the person who signed it.

[10] Over and above providing clarity to the court that the accused has pleaded guilty correctly, there is an added advantage to this practice – it obviates a situation where even though an attorney was instructed by an accused to tender a plea of guilty on his/her or behalf, that accused later willy-nilly disavows the admissions of fact and law made in the statement that he/she accused made in support of his/her plea.

[11] In omitting to invite the accused to confirm that what was read on the record was indeed her admissions of the allegations made against her in the charge, the learned magistrate committed an irregularity. However, this is not the end of this Court's enquiry, the question which follows is whether the accused's conviction is vitiated by the

irregularity, i.e. whether she was prejudiced by the omission that it may be said that an injustice was done. I think not, for the reasons I set out hereunder.

[12] When the prosecutor put the charge to the accused, she indicated that she understood it. Asked how she was pleading to the charge, the accused indicated that she was pleading guilty. The plea she tendered was followed by a confirmation given by her legal representative that the plea accorded with the instructions he held from the accused. The material portion of the plea statement of the accused which her legal representative went on and read on record is reproduced below:

“I am the accused in this matter and I understand the charge against me. I make this statement freely and voluntarily and without any undue influence to the same. I am guilty of the crime of theft that on 25 December 2023 at PEP Stores in the district of Joe Gqabi. I did wrongfully and intentionally steal one sandal, ladies takkies, a spray valued at R480, 00. With the intent to defraud [sic] the owner permanently. The items belong to PEP Stores or Andiswa.

On the day in question I went to PEP Stores. I took the said items. I concealed them in my handbag without purchasing for [sic] them. Then the lady asked the possession, about the items that were in my possession. And they were found in my handbag. Then I was arrested. At all material times I understood that my actions were wrongful and unlawful. And I have no defence in law to justify my actions. And my actions are punishable by law. I humbly request the Honourable Court to be lenient on me when imposing sentence. I am remorseful for my actions.”

[13] It bears mentioning that the accused’s attorney was present in court in order to protect the interests of the accused, *inter alia*. What immediately emerges from the record is that after the charge was put to her, the accused immediately indicated that she was pleading guilty to the charge which she had earlier confirmed she understood.

[14] I have read the original document appearing to be the hand written statement of the accused in support of her plea of guilty, it has been signed by the accused and her legal representative. The items enumerated in the charge which the accused indicated she understood and in respect of which she pleaded guilty to the offence of theft, save for one (namely, “a pair of girls attire”) are contained in her plea statement.

[15] The rest of the facts contained in the plea statement relate to how she committed the theft. These constitute facts relevant to the facts in issue and in turn serve to enable the court’s conclusions of fact and law, viz, the intention to steal (*mens rea*) and the absence of consent or legally recognized right to appropriate the items, as well as the act of appropriation, respectively.

[16] It is my finding that no prejudice was suffered by the accused in the circumstances of this specific case. Her conviction has not been vitiated by the judicial officer’s failure to invite the accused to confirm the contents of her plea statement. There is therefore no reason to tamper with the conviction of the accused.

[17] Concerning the sentence that the learned magistrate imposed, a restatement of the principles governing the imposition of a suspended sentence is necessary. The starting point is section 297(1)(b) of the CPA which entitles the court to suspend a sentence for a maximum period of five years on various conditions. As held in *S v Koko*³, a suspended sentence serves a twofold purpose. It avoids a repetition in the future of the criminal conduct that an accused has been convicted of; and avoids the harmful consequences that direct imprisonment may have.

[18] Great care must be taken in setting out conditions of suspension of the operation of a sentence. They must be set out in clear and precise terms.⁴ There is good reason for this. The accused must know what conduct he must avoid during the period of suspension to avoid the suspended sentence being put in operation.

³ 2006 (1) SACR 15 (C) at 21.

⁴ *S v Mjware* 1990 (1) SACR 388 (N) at 389g.

[19] Equally important is the requirement that the condition of suspension of sentence must bear some relationship to the circumstances of the crime which is being punished by the imposition of a suspended sentence.⁵ A phrase such as “similar offence” is vague and far reaching in nature as it may in the future result in the accused being punished for offences that are far removed from the theft she was punished for. The importance of circumspection in setting out the conditions of suspension of sentence can never be over emphasized when regard is had to how the proper administration of justice could be hampered if the sentencing court fails to exercise the required degree of care.

[20] In as much as it is evident that the learned magistrate’s intention was to wholly suspend the period of six months’ imprisonment, the conditions on which it was suspended are vague. In this regard, the sentence falls short in setting out in clear terms what criminal conduct the accused must eschew, and what the consequences of her failure to avoid such criminal conduct would be. The sentence as it is warrants interference by this Court.

[21] I must interpose to state that even though the accused was convicted and sentenced on 17 January 2024, the irregularities in the proceedings were identified (presumably by the Senior Magistrate) on 20 March 2024. The record of proceedings was received by the Registrar of this Court on 30 April 2024. Subsection 4 of section 304 in terms of which these proceedings serve before this Court provides as follows:

‘(4) If in any criminal case in which a magistrate’s court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such

⁵ *R v Cloete* 1950 (4) SA 191 (E) at 192 F-G; *S v Maqina*; *S v Madinda* 1996 (1) SACR 258 (E); *S v Tsantshana* 1996 (2) SACR 157 (E).

proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.'

[22] For the sake of completeness, I refer to the provisions of section 303 which are as follows:

'303 The clerk of the court in question shall within one week after the determination of a case referred to in paragraph (a) of section 302 (1) forward to the registrar of the provincial or local division having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish to append thereto, and with any written statement or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as possible, lay the same in chambers before a judge of that division for his consideration.'

[23] The Magistrate requesting the special review has not proffered any explanation why the record of proceedings was not laid before the Reviewing Judge within the period set out in section 303 of the CPA. The late and unexplained delays in the transmission of records for review must as far as possible be avoided as they are invariably prejudicial to the accused and in general inimical to the proper administration of justice.

[24] That being said, *ex facie* the record, it is clear that the proceedings at which the accused was sentenced are not in accordance with justice. It is not expedient to invite the judicial officer who presided over the proceedings to give reasons for the sentence that was imposed on the accused.

[25] Consequently, I would made the following order:

1. The conviction of the accused is hereby confirmed.

2. The sentence imposed on the accused is set aside and corrected to the extent set out below.

“(a) The accused is sentenced to undergo six (6) months’ imprisonment. The operation of this sentence is wholly suspended for three (3) years on condition that the accused is not convicted of the offence of theft, or attempted theft which she commits during the period of suspension and for which she is sentenced to imprisonment without an option of a fine.”

L. RUSI
JUDGE OF THE HIGH COURT

I concur.

F. DAWOOD
JUDGE OF THE HIGH COURT

Date handed down : 25 September 2024