



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

Case No: CA&R162/2025

In the matter between:

THE STATE

and

R[...] Z[...] R[...]

Accused

REVIEW JUDGMENT

APPELS AJ:

[1] The accused in this matter, a 17-year-old teenager, was convicted in the Middelburg Magistrate's Court of contravention of section 36 of Act 62 of 1955 ("the Act"). The accused was sentenced to 30 months' compulsory residence in a Child and Youth Care centre.

[2] This matter came before this court by way of a review in terms of section 85 of the Child Justice Act 75 of 2008 (“the CJA”) read with section 304 of the Criminal Procedure Act 51 of 1977 (“the CPA”). In terms of section 85 of the CJA, where a child of 16 years or older, under the age of 18 years old at the time of the commission of the offence, is sentenced to any form of imprisonment that is not wholly suspended or where he/she is sentenced to compulsory residence in a Child and Youth Care centre, such case is subject to automatic review.

[3] Section 304(2) (a) of the CPA provides that if it appears that the proceedings under review are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, the reviewing judge shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting and sentencing the accused and shall place the proceedings and the statement of the magistrate before the High Court for consideration as a Court of Appeal.

[4] If the judge concerned is of the opinion that the conviction or sentencing of the accused are clearly not in accordance with justice and that the person convicted may be prejudiced if the record of the proceedings is not forthwith placed before the High Court, the judge may lay the record of the proceedings before the High Court without obtaining the statement of the judicial officer who presided at the trial.

[5] I am of the view that the conviction and sentencing of the accused are clearly not in accordance with justice and the accused would be prejudiced if the proceedings is not forthwith placed before this Court.

Conviction

[6] At the commencement of the proceedings on 7 July 2025, the main charge of theft, appearing from Annexure A of the charge sheet, was withdrawn. The prosecutor indicated to the court that the accused would plead to the alternative count reflected in Annexure B, to wit contravention of section 36 of the Act. Annexure B to the charge sheet set out the alternative count which was put to the accused as follows:

‘That the accused is guilty of the crime of contravening the provisions of section 36 of the General Law Amendment Act 62 of 1955 in that on or about 30 April 2025 and or near 81 Miles Road. in the district of Middelburg EC, he was found in the unlawful possession of goods, other than stock or produce as defined in Section 1 of the stock theft act 57 of 1959 to wit 1 blue Raleigh bicycle valued at 500 rand in regard to which there was a reasonable suspicion that the said goods had been stolen and the accused was unable to give a satisfactory account of such possession.’

[7] After the charge was put to the accused, he was asked whether he understood the charge to which he responded “yes”. When he was asked to plead, he pleaded guilty. His legal representative, Ms Kahn, confirmed that the plea of guilty was in accordance with her instructions and proceeded to read the accused’s written statement in terms of section 112(2) of the CPA into the record.

[8] The accused confirmed that the statement was in accordance with his instructions. The statement was admitted into evidence as Exhibit A and the magistrate, after recording that he was satisfied that the accused had admitted all the elements of the offence, found the accused guilty as charged.

[9] The analysis of the elements of the offence and of the written statement, however, reflects that the accused did not in fact admit all the elements of the

offence and the magistrate ought not to have found him guilty on the strength of the statement. The offence of contravention of section 36 of the Act is committed if a person who is found in possession of goods suspected of being stolen, is unable to provide a reasonable explanation for the possession.¹ The words “*who is found in possession*” means that the accused must have personal and direct control over the goods.²

[10] Before analysing the contents of the section 112(2) written statement, it is important to note the purpose of the written statement. From a plain reading of section 112(2), the purpose of the written statement is to set out facts which the accused admits and on the strength of which the court may convict the accused in lieu of questioning the accused under section 112(1)(b).

[11] In other words, the written statement obviates the need for the presiding magistrate to question the accused in order to ascertain whether he admits the allegation in the charge to which he has pleaded guilty. However, if a presiding magistrate is not satisfied that he may convict the accused on the basis of the written statement, he remains entitled to pose further questions to the accused.³ If he is not satisfied that the accused admits all the allegations in the charge, he should enter a plea of not guilty in terms of section 113 of the CPA.

[12] In *S v Mshengu*,⁴ it was held that:

‘Section 112(2) requires that the statement must set out the facts which he admits and on which he has pleaded guilty. Legal conclusions will not suffice. The presiding officer can only convict if he or she is satisfied that

¹ Snyman, Criminal Law, 6th Ed., p 516.

² *State v Nader* 1963 (1) SA 843 (O), p 846C-E and p847E-F; *S v Essack* 1963 (1) SA 922 (T) at p 924A-B.

³ *S v TNS* [2015] 1 All SA 223 (WCC) at para 33.

⁴ *S v Mshengu* 2009 (2) SACR 316 (SCA) at para 7.

the accused is indeed guilty of the offence to which a guilty plea has been tendered. If not, the provisions of s113 must be invoked. '

[13] The relevant part of the section 112(2) statement reads as follows:

'I plead guilty to the charge of contravening section 36 of Act 62 of 1955, in that at or around the 30th of April 2025 and at 8[...] M[...] Rd. in the district of Middelburg EC, I was wrongfully found in possession of goods, to wit a blue Raleigh bicycle valued at R500, in regard to which there is a reasonable suspicion that it was stolen, and I am wrongfully and unlawfully unable to give a satisfactory account of such position.

On the day of the incident, the above-mentioned item was found at my place of residence. The police reasonably suspected that the item could be stolen, due to it being known that I do not own a bicycle. I was unable to give them a satisfactory account of how the item came into my possession and still cannot give the Court an explanation that will satisfy it. I know not providing such an explanation is wrongful and punishable by law.'

[14] As set out above, “*found in possession*” in the context of section 36 of the Act means having personal and direct control over the goods. It is evident from the written statement that the bicycle was found at the accused’s place of residence. The written statement does not contain a sufficient factual basis for the court to have concluded that the accused was found in possession of the goods within the meaning as contemplated in section 36 of the Act.

[15] No facts are provided as to whether the bicycle was found in his bedroom or other area of his residence under his control or any other details relating to the accused’s proximity to the bicycle, or whether the accused was present at his residence when the bicycle was found. If the accused lives with

several other people,⁵ he can hardly be expected to provide an explanation for goods found at any random place at a residence he shares with others, unless there is some factual basis for concluding that the goods were under his direct and personal control.

[16] The magistrate could therefore not have been satisfied, on the basis of what is contained in the written statement that all the elements of the offence had been admitted. He should have asked further questions in terms of section 112(2)(b) or applied the provisions of section 113 of the CPA. The conviction of the accused therefore falls to be set aside.

Sentence

[17] The State proved no previous convictions, and the accused was therefore a first offender.

[18] The prosecutor handed in a pre-sentence report (“the report”), marked Exhibit B. The report was compiled by Mr A Higa, a probation officer employed by the Department of Social Development, Eastern Cape in Cradock. The report was approved by Mr V Bhakani, the supervisor of Mr Higa. There was no objection from Ms Kahn even though the report contained several patent inaccuracies.

[19] Firstly, in paragraph 3 of the report, it is stated that the accused was found guilty on the charge of theft and possession of stolen property. This is incorrect. This error was presumably induced by the fact that the charge sheet contained Annexure A, setting out the main count of theft and Annexure B, setting out the alternative to the main count which is the offence of contravention of section 36 of the Act. The probation officer clearly was not

⁵ According to the probation officer’s report, admitted into evidence as Exhibit B, the accused lives in a four roomed house with three siblings, his mother and grandparents.

aware that the accused was only charged with one count and pleaded guilty to the alternative count. He was not charged with multiple offences.

[20] Secondly, in paragraph 11.3 of the report, the probation officer notes that the accused is not a first offender. This is clearly incorrect as the State proved no previous convictions against the accused.

[21] Thirdly, in paragraphs 11.1 and 11.2 of the report, the probation officer discusses the offences and the attitude of the accused towards the offences and once again erroneously notes that the accused was convicted of theft and possession of stolen property. He also notes that the accused admitted that he committed “*both offences*” and that he provided detail of how those offences were committed. In this regard she states the following:

‘The accused stated that he was sent by an adult to steal a bicycle. He reported that they were going to sell the bicycle so that they can buy drugs. On the second case of stolen property the accused also reported that he was also sent by an adult to go and steal. The accused admits that he has committed both offences. He seemed remorseful during consultation with the probation officer. The accused mentioned that he is willing to apologise to the complainants.’

[22] It is inconceivable that the accused could have conveyed to the probation officer that he committed “*both offences*” or that he could have given the probation officer an account of how those two offences were committed. There was simply never more than one offence committed by the accused, neither was the accused charged with more than one offence. There was one count of theft in respect of one bicycle and an alternative count in respect of the same bicycle. The accused pleaded guilty and was convicted of only one offence as set out in Annexure B which recorded the alternative count.

[23] The probation officer then shockingly recommends that the accused should be sentenced to compulsory residence in a Child and Youth Care centre in terms of section 76(1) of the CJA.

[24] Quite remarkably, when Ms Kahn was invited by the magistrate to address the court in respect of mitigation of sentence, she declined and remarked as follows:

‘Thank you Your Worship, since we have a rather thorough report from the social worker I am not going to go through ... my client’s circumstance.’

[25] She went on to endorse the probation officer’s recommendation and stated the following:

‘[It] is probably the best outcome that we can hope for in this matter because we need to try and keep my client out of prison but we also need to let him learn a lesson.’

[26] She ended off her address by stating:

‘I think a bit of order and strictness is what my client does need at this stage.’

[27] Ms Kahn failed to properly consider the contents of the report and failed to point out to the magistrate the many inaccuracies and errors contained therein. She should not have endorsed the recommendation in the report given that the recommendation was based on incorrect information.

[28] In addition, Ms Khan failed to present to the court mitigating circumstances on behalf of her client. Legal practitioners have a duty to make

proper use of the right to address the court on sentencing in terms of section 274(2) of the CPA.⁶

[29] The prosecutor also endorsed the recommendations of the probation officer without addressing the court on any relevant aspects regarding sentence. Notably, apart from not pointing out the glaring errors and inaccuracies in the report, she also failed to address the court on the nature and seriousness of the offence.

[30] The magistrate sentenced the accused to 30 months of residence in a Child and Youth Care centre as recommended by the probation officer. The first paragraph of the sentencing judgment reads as follows:

‘The child offender before court has been found guilty of an offence of theft and that of contravening the provisions of Section 36, both offences are extremely serious and extremely prevalent in the jurisdiction of Middelburg.’

[31] The magistrate completely disregarded the fact that he convicted the accused only of one offence, that being a contravention of section 36 of the Act and simply repeated the error in the report. This was a material misdirection by the magistrate and was the inevitable result of Ms Kahn, the prosecutor and the magistrate uncritically accepting and endorsing the recommendation of the report without having any regard to the relevant considerations regarding sentence.

[32] Although it is the duty of the parties to place the relevant and necessary facts before the presiding officer, where they fail to do so, the court has duty to see that it is done.⁷

⁶ See: Du Toit et al, Commentary on the Criminal Procedure Act, Service 69, 2022, p28-6M.

⁷ *S v Pillay* 2011 (2) SACR 409 (SCA) at p 416 D-E; and also *S v EN* 2014 (1) SACR 198 (SCA) at para [14].

[33] What stands out in this matter is the complete lack of consideration by the magistrate of the Zinn-triad.⁸ There was notably no consideration of the personal circumstances of the accused, the nature and seriousness of the offence and the interest of society. There was also no analysis as to whether the proposed sentence was proportionate to the seriousness of the offence. It is trite that there must be an appropriate link between the sentence and the severity of the crime.

[34] In my view, the sentence imposed was shockingly inappropriate given the nature of the offence of which the accused was convicted. A non-custodial sentence would have been more appropriate. Ms Kahn, the prosecutor and the magistrate over-emphasised deterrence as punishment without considering other purposes of sentencing.

[35] The magistrate, in sentencing the accused, committed a material misdirection and irregularity when he held that the accused was convicted of theft and contravention of section 36 of the Act. Ultimately, the sentence was based on incorrect information and on the rubberstamping of a recommendation in a report that was riddled with inaccuracies.

[36] I am therefore of the view that the sentence ought to be reviewed and set aside.

Remittal is not appropriate

[37] If a conviction is set aside solely on the basis of non-compliance with section 112, section 312(1) of the CPA the section requires that the matter be

⁸ In *S v Zinn* 1969 (2) SA 537 (A) at 540G it was held that “*What has to be considered is the triad consisting of the crime, the offender and the interests of society*”. This principle has become trite law and is often referred to as the “Zinn-triad”.

remitted to the trial court for it to comply with or to act in terms of section 113. Section 312(1) provides:

‘(1) Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1)(b) or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be.’

[38] However, in *S v Mshengu*, the court held that the provisions of section 312 of the CPA are not peremptory.⁹ If an injustice would result from remittal, or if remittal would be a futile exercise, the court retains a discretion not to order remittal.¹⁰

[39] In my view, remittal in terms of section 312 of the CPA would result in an injustice. The accused has already served two months of his sentence at the Child Youth Care Centre. Considering that a non-custodial sentence would have been more appropriate in this matter, it would be unfair to order remittal when the accused has already served a part of a custodial sentence.

Order

[40] Accordingly, the following order is made:

[1] The conviction and sentence of the accused under Case No. CJ02/2025, in the Magistrate’s Court of Middelburg, Eastern Cape, are reviewed and set aside.

⁹ *S v Mshengu*, *supra* at para 17.

¹⁰ *S v Mshengu*, *supra* at para 18.

[2] If the prosecuting authority decides to prosecute the accused *de novo*, the proceedings must be heard by a different magistrate.

[3] The Registrar must cause a copy of this judgment to be submitted to:

(a) The office of the Director of Public Prosecutions, Makhanda, for the attention of the prosecutor who appeared for the State;

(b) The Legal Aid Board, for the attention of the legal practitioner, Ms Kahn, who appeared for the accused in the court *a quo*;

(c) The Department of Social Development, Eastern Cape in Cradock, for the attention of Mr V Bhakani; and

(d) The accused's guardian, Ms Zandi Pieterse, who was present during the proceedings in the court *a quo*.

G APPELS
ACTING JUDGE OF THE HIGH COURT

Laing J

I agree,

J G A LAING
JUDGE OF THE HIGH COURT

Date Delivered: 10 October 2025

