



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Reportable

Case No: 310/2025

In the matter between:

THE STATE

And

RAMADAAN MAMYOTA

Accused

Coram: LEKHULENI J, *et* MHIMUNYE, AJ

Judgment date: 11 September 2026

Summary: *Criminal law and procedure - S112(1)(b) of Criminal Procedure Act 51 of 1977- Inadequate questioning – Not all the elements of the offence established – Fair trial rights for an unrepresented accused - conviction and sentence set aside.*

ORDER

- (a) The convictions and sentences are set aside
- (b) The deportation order granted on 14 July 2026 is set aside.
- (c) The Registrar is directed to provide a copy of this judgment to the Chief Magistrate of Cape Town and the National Prosecuting Authority.

(d) The accused may be dealt with by the Department of Home Affairs in terms of the provisions of the Immigration Act if his stay in the Republic is, and remains, unlawful.

JUDGMENT

Mthimunye AJ

Introduction

[1] The matter was submitted before me as a special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 ('the CPA') on 13 August 2026. The accused appeared before the Magistrate in Cape Town on a charge of assault and for contravening the provisions of section 49(1)(a) read with section 1 of the Immigration Act 13 of 2002 ('the Immigration Act'), as amended. On 14 July 2026, the accused was subsequently convicted and sentenced on the assault charge, to a fine of One Thousand Rand (R1000) or Thirty (30) days imprisonment and, on contravening the provisions of section 49(1)(a) of Immigration Act, to a fine of Three Thousand Rand (R3000) or 90 days imprisonment.

[2] This matter was transmitted to this court by the Senior Magistrate, Mr LP Van Der Spuy, sitting at Cape Town, with a covering letter dated 4 August 2026, which read verbatim as follows:

"Re: Special Review: S v Ramadaan Mamoyota; case number 14/1073/2025; Special Review number 79/2026.

During a random assessment, this matter came to my attention.

From the record it is clear that the accused was convicted of and sentenced for 1. Assault and 2. Contravening section 49(1)(a) of Act 31 of 2002. A deportation order was also made. At the time of plea proceedings, the accused was not legally represented.

It is my opinion that the section 112(1)(b) Act 51 of 1977 questioning was insufficient in respect of both counts and failed to fully cover the elements of the charges. As such both convictions are unsound.

I respectfully request the honourable reviewing Judge to make an appropriate order”

The charges

[3] As foreshadowed above, the accused faced two counts. The first count was that of assault common. It was alleged that on or about 24 September 2025 and at or near Darling Street, Cape Town, within the District of the City of Cape Town, the accused did unlawfully and intentionally assault Sergeant Nel Hendricks by hitting him on his right arm whilst attempting to handcuff him. On the second count, the State preferred a charge of contravening the provisions of section 49(1)(a) read with section 1 of the Immigration Act as amended. The State alleged that on or about 24 September 2025, at or near Darling Street, Cape Town, within the District of the City of Cape Town, the accused unlawfully and intentionally entered or remained in or departed from the Republic in contravention of this Act by remaining in the Republic without authorization and/or without authorization from the Department of Home Affairs to remain in the Republic of South Africa.

The Plea Proceedings

[4] In considering the request by the senior magistrate, I perused the chargesheet and noted that the questioning of the accused in terms of section 112(1)(b) of the CPA was conducted by the trial magistrate in a perfunctory and cursory manner. For completeness, I reproduce verbatim the relevant portion of the questioning which, inter alia, unfolded as follows:

“Q: The incident you are about to relate to this Court, did it occur on the 24/09/2025 at Darling?”

A: Yes

Q: In your own words relate to Court what exactly happened which led to you being arrested?

A: I was coming from Long Street, the Police arrived from behind me, they stopped me and asked to search me. I agreed, one of them choke me from behind, when I turned my head, my teeth scratched his arm, he hit me with some metal on my nose another police came, I did not resist, they hand, he was not injured. [underlined for emphasis]

Q: Was he in uniform?

A: I was bleeding from my nose, and they took me to the police station, one of the police cleaned my nose with warm water. They gave me papers to clean my nose. They open a docket while blood was all over me, they also asked me for my papers, there was no papers, I informed them I don't have.

[5] Concerning count 2, the court questioned the accused as follows:

Q: Did you know that you must have valid documents?

A: Yes

Q: Why did you not get your papers?

A: Asylum was rejected. 17 years no permit where I come from.

Q: Did you know it was wrong?

A: Yes, I knew. I did not follow up to legalize my stay.

Q: Did you know you would be arrested?

A: Yes

Q: Did you know you will be deported?

A: ... (no answer by accused)

Q: Did you know what you did was wrong and punishable by the Law?

A: Yes

Q: What was your intention?

A: To stay.

Does the state accept the Plea as being in accordance with the state's case?

State hand up Exhibit "A" 212 statement.

The court is satisfied that accused intended to plead guilty to this offence, he does not have a valid defense but to plead guilty Accused is found guilty on both counts."

Relevant legal principles and Discussion

[6] In terms of section 35(3) of the Constitution an accused person has got the right to a fair trial. This right includes the right to be treated fairly during plea proceedings in terms of the provisions of section 112(1)(b) of the CPA, when an accused has elected to waive his or her right to remain silent, and the fairness of such proceedings should consequently be safeguarded by the magistrate who presides over them. (*S v Fransmen & another* 2018 (2) SACR 250 (WCC) para 12.

[7] For completeness, section 112(1)(b) provides that:

‘(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-

(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 the notice in the Gazette, 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, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.’

[8] The consequences of section 112(1)(b) of the CPA, is that it dispenses with the need to call witnesses but places an obligation on the court to satisfy itself on the guilt of an accused, more importantly so when the accused is unrepresented and appears in person.

[9] It is trite that the purpose of the questioning in terms of section 112(1)(b) is two-faced “to determine whether the accused admits the allegations in the charge sheet upon which there was a guilty plea and secondly to enable the court to conclude for itself whether the accused is, in fact, guilty.” (*Hiemstra’s Criminal Procedure* 17-3, Service Issue 12, May 2019). In the first phase of the enquiry, the court has to ascertain whether the accused has admitted facts which establish all the elements of the offence. The second phase of the enquiry amounts essentially to determining whether the legal requirements, such as the questions of the unlawfulness, *actus reus* and *mens rea* have been met to amount to a conviction. It follows that there is a duty on the court, before convicting an accused on a plea of guilty in terms of section 112(1)(b) to ensure that the accused admits all the elements of offence with which he is charged, by elucidating sufficient facts which tend to prove the elements of that offence.

[10] I now turn to look at the nature of the offences, in order to determine whether all the elements of these offences in the charge sheet have been admitted to by the accused during the questioning by the *court a quo*.

The elements of the offences the accused faced

[11] On the first count the accused faced a charge of assault. According to Buchell, assault by definition consists of (a) the unlawful and intentional application of force to the person of another or (b) the inspiring of a belief in the

other person that force is immediately to be applied to him (*Burchell, Principles of Criminal Law, Juta 5th Ed at 589 and 591*).

[12] The second count was a contravention of the Immigration Act. A contravention of sections 49(1)(a) of the Immigration Act 13 of 2002 consists of the following elements: (a) that the accused unlawfully and intentionally, (b) entered or remained in or departs from the Republic in contravention of this Act, (c) by remaining in the Republic without authorisation and (d) a failure to depart from the Republic when so ordered by the Director General.

[13] In both of these offences, intention and unlawfulness are elements that have to be proven for a sustainable conviction. The accused on count 1 stated that, as a result of one of the police choking him from behind, he turned his head, scratching his teeth against the police officer's arm. The accused made an exculpatory statement in this regard when questioned by the court on count 1. The accused made no admissions whatsoever that he had the intention to unlawfully enter or remain in the Republic in contravention of the Immigration Act. Clearly, the accused's explanation fell short on both counts of intention and unlawfulness. No sufficient admissions by the accused of the essential elements of the offenses were made to sustain a conviction on both counts. The accused's answers clearly show that he had no intention of committing these offences, nor that he may have appreciated the wrongfulness of his actions.

[14] In respect of count 1, the plea is not only lacking, but it is undoubtedly apparent that the accused raised a reasonable defence that necessitated the court to change his plea of guilty to that of not guilty in terms of section 113 of the CPA. In *S v Wen Andere* 1999 (2) SACR 640 (C) at 641H, it was held that, if after a number of questions, it appears that the accused never admitted an

essential element of the offence charged, in fact was to advance a defense or excuse, a plea of not guilty in terms of section 113 has to be noted.

[15] This proposition in principle was also recognised in the case of *S v Naidoo* (292/1987) [1988] ZASCA 156; [1989] (4) All SA 408 (AD) (29 November 1988) para 18, where it was held that if an accused's answers "*suggest a possible defence or leave room for a reasonable explanation other than guilt, a plea of not guilty should be entered and the matter clarified by evidence*". The foregoing unavoidably leads to an inescapable conclusion that the conviction in count 1 is not in accordance with justice and must be set aside.

[16] In respect of count 2, looking at the questions put to the accused, it seems the magistrate had no substantive appreciation of the elements to be proved in this statutory offence. This is evident from the shortcomings in the magistrate's questioning. The court asked the accused what his intention was, and the latter stated that he intended to stay. It is not clear what this meant. The court did not clarify this aspect. It must be emphasised that, when questioning an accused in terms of s 112(1)(b) of the CPA, particularly in relation to statutory offences, the court bears a duty, heightened where the accused is unrepresented, to ensure that the accused understands the elements of the statutory offence before a sustainable conviction can follow. The court must avoid leading questions. It must afford the accused an opportunity to narrate, in his own words, the circumstances that led to his arrest on the charges levelled against him. The court should further avoid merely regurgitating the charge-sheet when posing questions, and must instead allow the accused to set out the factual basis underpinning his plea of guilty.

[17] As foreshadowed above, in questioning the accused, the magistrate in the present matter had to do more than put leading questions to the accused. It was the magistrate's duty to determine whether the accused admits all the elements in the charge sheet and to satisfy himself or herself that the accused is indeed pleading guilty. Merely accepting the section 212 affidavit by the immigration officer handed in by the prosecutor, without verifying whether the accused understands its contents, what the consequences, purpose and probative value of the affidavit is, is a clear violation of the accused's right to a fair trial entrenched in section 35(3) of the Constitution.

[18] Every judicial officer has a duty to jealously protect the rights of an accused, particularly where the accused is unrepresented. It is concerning that, on the record, there is no indication that the State accepted the accused's plea. The court asked the State whether it accepted the plea, yet instead of answering that question, the prosecutor submitted a statement in terms of s 212 of the CPA.

[19] What further compounds the difficulty in this matter is that the court accepted the statement in terms of s 212 without first establishing the accused's position regarding its contents. It is also unclear what the s 212 statement was intended to prove. I accept that, once all the requirements set out in s 212(4) are satisfied, such a statement shall, upon its mere production, constitute prima facie proof of the fact asserted. However, in this case it was never established which fact the State intended to assert or prove through the statement.

[20] Nowhere *ex facie* from the record of the *court a quo* does it reflect that the section 212 affidavit was explained to the accused or that the accused was given a chance to examine or agree with these findings. Based on the foregoing

relating to count 2, it also leads one to the conclusion that the proceedings before the trial magistrate are not in accordance with justice and must be set aside.

[21] This then raises the question: what of the deportation order? In my view, because both convictions have been found not to be in accordance with justice and fall to be set aside, the consequences or the ancillary orders attendant upon those convictions must likewise be set aside. This includes the deportation order granted on 14 July 2026, which accordingly falls to be set aside. However, this judgment does not hold that the accused must remain unlawfully in the Republic. The accused may still be processed and dealt with by the Department of Home Affairs in terms of the Immigration Act if his stay in the Republic is and remains unlawful.

[22] The only issue remaining is whether it would be appropriate, in the present circumstances, to remit the matter to the magistrate's court for the matter to start *de novo*. I am of the view that it would serve no practical purpose and would prejudice the accused, as he has already completed the sentence on count 1 and on count 2 and might already have been eligible for release on parole. In order to avoid the accused from suffering further prejudice, I am of the view that since I found that both convictions and sentences should be set aside, it would be appropriate that any amount paid by the accused, if any, in respect of the fines imposed, should be refunded to the accused.

[23] I also direct that the Chief Magistrate of Cape Town and the Department of Home Affairs be informed urgently that the deportation order against the accused dated 14 July 2026 has been set aside.

Order

[24] In the result, the following order is made:

- (a) The convictions and sentences are set aside.
- (b) The deportation order granted on 14 July 2026 is set aside.
- (c) The Registrar is directed to provide a copy of this judgment to the Chief Magistrate of Cape Town and the National Prosecuting Authority.
- (d) The accused may be dealt with by the Department of Home Affairs in terms of the provisions of the Immigration Act if his stay in the Republic is, and remains, unlawful.

MTHIMUNYE S
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered:

LEKHULENI JD
JUDGE OF THE HIGH COURT