

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Review No.: 132/2014(B)

In the review between:

THE STATE

versus

DUMA JOHANNES MOKAPING

CORAM: LEKALE, J *et* MBHELE, AJ

JUDGMENT BY: MBHELE, AJ

DELIVERED ON: 4 SEPTEMBER 2014

- [1] The matter served before us by way of special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977. The accused was convicted of one count of Housebreaking with intent to commit an offence unknown to the State. He was sentenced to R1 500.00 or two months' imprisonment suspended for three years on condition he is not convicted of Housebreaking with intent to commit an offence unknown to the State during the period of suspension.
- [2] The accused was convicted summarily after the provisions of section 112(1)(a) of Act 51 of 1977 were invoked. The charge was not put to the accused. The heading of the

charge reads “Housebreaking with intent to commit theft” whilst the averments are that of Housebreaking with intent to commit a crime unknown to the State. The sentence recorded on the charge sheet differs from the one pronounced.

- [3] Both the State and the accused were not granted an opportunity to address the court before the accused was sentenced nor was the accused apprised of his rights before sentence. The provisions of section 103 of the Firearms Control Act 60 of 2000 were not invoked. It further appears from the record that the accused was not asked if he was pleading guilty freely and voluntarily without being influenced thereto. He was not asked whether he understood the charge against him. The accused was not afforded enough time to prepare for his defence.

- [4] The above discrepancies caught the vigilant eye of the Senior magistrate who invoked the provisions of section 304 (4) of the Criminal Procedure Act with the following request:

“I respectfully recommend that the conviction and sentence be set aside and that the honourable Judge make any further / alternative orders as he/ she may deem fit’.

- [5] Having perused the record, I am in agreement with the senior magistrate that the proceedings in this matter were not in accordance with Justice.

- [6] The right to a fair trial is confirmed by section 35(3) of the Constitution which *inter alia* provides as follows:

“(3) Every accused person has a right to a fair trial, which includes the right-

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;”

- [7] The presiding officer’s failure to ensure that the charge is put to the accused with sufficient detail constitutes serious violation to the accused’s right to a fair trial. It is apparent from the record that the accused pleaded guilty to a charge he did not understand.

- [8] The authors of the work **Hiemstra’s Criminal Procedure** at 17-3 state the following when dealing with section 112(1)(a):

“Whether the sentence can be a fine of more than R5 000.00 must not be decided lightly. There has to be information before court which information makes a judicial discretion possible. The presiding officer must have regard to (i) nature of the offence; (ii) any prescribed maximum; and (iii) the particulars in the charge. Where there is doubt about the seriousness of the transgression, questioning ought to take place.”

I agree with the submission. In this matter it is apparent that the magistrate did not embark on this exercise.

- [9] The right to a fair trial is entrenched in the Constitution and failure of a judicial officer to inform the accused of any of his legal rights may lead to an injustice. Such rights are rooted in the principle that the accused must have a fair trial.

See: **S v Zuma** 1995 (2) SA 642 (CC).

- [10] It is trite that the court must obtain all relevant facts and circumstances necessary for the court to exercise a proper discretion before sentencing the accused.

- [11] It is not clear from the record what principle was applied to inform the decision on the sentence imposed by the magistrate.

- [12] I am of the view that the magistrate committed several misdirections that warrant the setting aside of both conviction and sentence.

- [13] I would therefore make the following order:

1. The accused's conviction and sentence are set aside.
2. The matter is remitted back to the magistrate's court for a hearing *de novo*.

N.M. MBHELE, AJ

I concur.

L.J LEKALE, J

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