

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

Review No.: 136/2014(B)

In the review between:

THE STATE

versus

SAM LEPHALLO

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 contravening section 4(b) of Drugs and Drug Trafficking Act 140 of 1992 (possession of drugs) and one count of malicious damage to property. For the purposes of sentence, both counts were taken as one. The accused has been sentenced to R1 500.00 or three months' imprisonment suspended for three years on condition he is not convicted of contravention of Act 140 of 1992 and of malicious damage to property committed during the period of suspension.

- [2] The senior magistrate referred the matter for special review with the request that the conviction and sentence be set aside. The magistrate commented as follows:

“The accused person was not legally represented. The case record does not indicate that the accused right to legal representation was explained to him, neither is it reflected in the transcription. Accused was convicted on both counts and sentenced as follows:

‘Fine of R1500 or 3 months imprisonment wholly suspended for period 3 years on condition accused is not convicted of **contravention of Act 140 of 1992 and of Malicious damage** to property committed during the period of suspension.’

From the recording it transpired that on the accused’s second appearance at court he was called to the accused stand. The prosecutor informed the court that the accused “faced” two charges that of “possession of dagga” and “malicious damage to property”. She further requested the court to find out what the accused intend to plead. Upon enquiry from the magistrate, the accused indicated he intends to plead guilty. The prosecutor requested that the matter be disposed of in terms of section 112(1)(a) of the Criminal Procedure Act 51 of 1977. Accused was then convicted on both counts. At no stage was the charges ever put to the accused by the State and did he indicate that he understood it. The magistrate then sentenced the accused without granting the accused and the prosecutor the opportunity to address the court. A suspended sentence was then imposed. A number of fundamental constitutional rights were breached.”

- [3] Having perused the record, I am in agreement with the senior magistrate on the issues alluded to in the preceding

paragraph. It further appears from the record that the accused was declared unfit to possess a firearm without an enquiry being held in terms of section 103 of the Firearms Control Act 60 of 2000. The accused was not asked if he was pleading guilty freely and voluntarily without being influenced thereto.

- [4] The right to a fair trial is confirmed by section 35(3) of the Constitution:

“(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;
- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;”

- [5] 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.

- [6] 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.

- [7] The right to legal representation 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);

- [8] 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. In this matter the magistrate did not offer both the State and the accused an opportunity to address the court before sentencing.
- [9] It is not clear from the record what principle was applied to inform the decision on the sentence imposed by the magistrate.
- [10] I am of the view that the magistrate committed several misdirections that warrant the setting aside of both conviction and sentence.

[11] 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