

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 194/2014

In matter between:

The State

And

Thabang Motlogelwa

CORAM: **KRUGER, J et MOENG, AJ**

JUDGMENT BY: **MOENG, AJ**

DELIVERED ON: **23 OCTOBER 2014**

- [1] This matter was placed before me on special review in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977('CPA'). As will appear hereunder, the litany of irregularities prompted the Senior Magistrate at Welkom to refer this matter to this court, with the recommendation that the conviction and sentence be set aside.

- [2] The facts herein can briefly be summarised as follows: the accused appeared in the magistrate court Hertzogville on one count of malicious injury to property. He pleaded guilty thereto on 15 April 2014 and was, on the same date, convicted and sentenced to a fine of R500.00 or 1month imprisonment suspended for three years on certain specified conditions. The magistrate declared the accused not unfit to possess a fire arm in terms of section 103(1) of the Fire Arms Control Act 60 of 2000 and ordered him to compensate the complainant in the amount of R600.00.
- [3] Save for the plea, verdict and sentence, the rest of the proceedings were not recorded. The Senior Magistrate indicates that the proceedings were not digitally recorded nor could the magistrate reconstruct the record from his notes. The following note is further made on the roneo form attached to the charge sheet: ***“Meganiiese opname – daaglikse CD/GEEN – geen operatriese”***
- [4] It does not appear *ex facie* the record and as pointed out by the Senior Magistrate:
- a) Whether the accused was informed of the charge he faced before he pleaded thereto;
 - b) Whether his right to legal representation was explained;
 - c) On what basis the conviction followed, therefore whether the provisions of section 112(1) (a) or 112(1) (b) of the CPA were applied;

- d) Whether the state was afforded the opportunity to prove previous convictions;
- e) Whether the accused's rights before sentence were explained;
- f) Whether both the prosecutor and the accused addressed the court before sentence was imposed;
- g) Whether the provisions of the Fire Arms Control Act were explained and what facts were placed on record for the finding in terms of section 103 of Act 60 of 2000 and;
- h) On what basis the compensation order that was granted in favour of the complainant was made.

[5] Section 4 (1) of the Magistrates Court Act ('MCA') provides that every court, in this instance, a magistrates court, shall be a court of record. This provision is peremptory and requires exact compliance. Any purported compliance falling short thereof would be a nullity.

[6] Section 5(1) of the MCA further reinforces the provisions of section 4(1) and provides that except for the requirement that criminal trials be open to the public, they should also be recorded by the presiding officer concerned. In addition thereto, section 76 (3) (a) of the CPA directs the court to keep a record of the proceedings, whether in writing or mechanical, or the court may cause such record to be kept.

- [7] It is clear from these provisions, and as has been repeatedly stated by our courts, that magistrate' courts are courts of record and the duty of a presiding officer to keep a proper and complete record of the proceedings is therefore vital. I align myself with what was said by Vivier AJ in *S v K* 1974 (3) SA 857 (C) at 858 G-H that;

‘Die plig van 'n landdros in 'n strafsak wanneer hy die rekord in eie hand afneem om volledig, noukeurig en duidelik te notuleer alles wat voor hom plaasvind wat enigsins relevant is tot die verrigtinge voor hom of die meriete van die saak is al by herhaling deur ons Howe beklemtoon’

- [8] The record is the only source from which it can be determined whether the proceedings were in accordance with justice and it portrays the facts upon which the conviction, sentence and any resultant orders are based. The importance thereof is further that the reader can glean from such record that the presiding officer has taken an informed decision in arriving at his verdict.
- [9] The record should speak for itself since its contents shall be *prima facie* proof of what transpired during such proceedings should the provisions of section 235(1) of the CPA be applied. The unassailable conclusion is therefore that whatever was not recorded was not said or explained and in that premise, I can unreservedly accept that the procedural rights of the accused were not complied with.

- [10] Section 35 (3) (a) of the Constitution guarantees the right of every accused person to a fair trial, which comprises of the right to be informed of the charge with sufficient detail to answer to it, whereas subsection (3) (f) and (g) guarantees the right of an accused to be informed of his right to be represented by a legal practitioner, and to have a legal practitioner assigned to him or her by the state at state expense, if substantial injustice would otherwise result.
- [11] It does not appear *ex facie* the record that these rights, which are the cornerstone of any civilised democracy, were explained. The right to legal representation is a right that is central to the fairness of criminal trials. Failure to explain such right is an infringement of the right to a fair trial and an irregularity vitiating proceedings. [See *S v Lusu* 2005 (2) SACR 538 (E)]
- [12] The right to legal representation is further interlinked with the right against self-incrimination. Once the right to legal representation is not explained the danger of self-incrimination of a lay person is amplified. [See *S v Melani* 1996 (1) SACR 335 (E)]. The guilty plea tendered by the accused should therefore be viewed in light of the failure to explain the right to legal representation.
- [13] There is no indication whether the accused was informed of the charge in terms of section 35(3) (a) of the Constitution nor is there

any indication that the charge was put to him in terms of section 105 of the CPA. In the absence of such explanation the accused could not have been asked to plead to the charges. I therefore do not consider it necessary to determine the validity of the plea, resultant conviction and sentence, since same were the consequence of an irregular procedure.

[14] The magistrate's order in terms of section 103(1) of Act 60 of 2000 is likewise misplaced. Apart from the irregularities relating to the failure to explain the provisions of section 103, as well as the lack of input from the prosecutor and the accused, the offence did not warrant application of the provisions of section 103(1), but at best section 103(2).

[15] The compensation order that was granted, purportedly in terms of section 300 of the CPA, was likewise improper. The indispensable prerequisite for such an order is that the complainant has to apply for such an order or mandate the prosecutor to do it on his or her behalf. The court can therefore not, as it appears in the case at hand, decide *mero motu* to grant such an order.

[16] Such an application should be preceded by a full explanation to the unrepresented accused as to the nature and import of the enquiry. Since the order is civil in nature, the accused as well as the

complainant should have been afforded the opportunity of leading evidence in quantification of the damages, if not earlier admitted by the accused or raised during the trial. [See S v Van Rensburg 1974 (2) SA 243 (T)]

- [17] Before I conclude, I need to remark that this is the fourth special review that I managed to trace, directed at the manner in which the same magistrate conducted criminal trials. The Senior Magistrate also remarked in his letter to the Acting Judge President that a number of other matters will still be forwarded to this court on special review. The convictions and sentences in all the matters I referred to were set aside.
- [18] All these matters, including the one at hand, regrettably indicate shoddy and careless workmanship expected of a judicial officer. The making of these elementary flaws, in my view, borders on the dereliction of his duties as a magistrate. I suggest that urgent steps be taken by the quality assurance office to correct this untenable situation.
- [19] The irregularities stated here above are such that it cannot be said that the accused had a fair trial as the proceedings were not in accordance with justice.

The following order is accordingly made;

1. The conviction and sentence are set aside.

LBJ MOENG, AJ

I concur

A. KRUGER, J