

Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	<u>YES</u> / NO
Circulate to Regional Magistrates:	YES / <u>NO</u>



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

**HIGH COURT REF NO: 20/2017
CASE NO: K99/17**

In the matter between:

THE STATE

And

NASH MNCUBE

REVIEW JUDGMENT

DJAJE J

[1] This matter was sent on special review on **03 October 2017** by the Regional Magistrate of Garankuwa with the following request:

“The case of S v Nash Ncube was referred to the regional court by the district court after the accused was convicted on the 31st July 2017 of the theft for sentence.

When the matter first appeared in the regional court, the transcribed record of the proceedings from the district court did not form part of the record. The matter was then remanded in order to obtain the transcribed record of the proceedings from the district court.

The transcribed record was ultimately received on the 23 August 2017 but the record was incomplete.

On perusal of the record the following were identified and for which the matter is now referred to the Honourable Judge in terms of section 304 A of Act 51 of 1977 as amended for special review.

Firstly the transcribed record is incomplete and does not reflect in terms of which section or reasons the matter is referred to the regional court.

Again ex facie the original face of the charge sheet it is endorsed that the matter is referred to the regional court in terms of section 75 (c) of Act 51 of 1977

The other issue with the matter is the plea tendered in terms of section 112 (2) of Act 51 of 1977 on behalf of the accused, the statement does not meet the requirements as set out in the Sv Chetty 2008 (2) SACR 157 W, namely that the statement does not provide the factual details necessary to the support conviction. In his statement accused only admits the guilt without giving details as to how alleged offence was committed. Even though I am aware of what the court said in S v Abrahams 1980 (4) SA 665 (C) namely of being empowered to question the accused afresh, the issue did not end there.

The magistrate when convicting the accused made the following pronouncement that the accused is found guilty in terms of section 112 (2) of Act 51 of 1977. The Honourable Judge is referred to page 4 paragraph 15 of the record. This aspect on its own posed a challenge in that the conviction could not be in terms of section 112 (2) of Act 51 of 1977. Even though I was of the view that section 114 (3) of Act 51 of 1977 could be evoked, in that I could not remit the matter back to the district court for the magistrate and or request explanation I am of the view that the issue raised

were far more pertinent to be disposed of by the regional court without the direction of the reviewing judge.

I further noted that the following issue namely that the parties went on to address the court in regard to mitigation and aggravation of sentence and the matter was stood down for sentence.

As to what transpired after the court resumed the only indication is as reflected on the face of charge sheet albeit under the wrong section. It could only be assumed that the magistrate intended to rely on section 114 (1) (b) of Act 51 of 1977.

The provisions of the sentence are peremptory in that the court should have stopped the proceeding immediately after the state had proven the record of the previous conviction against the accused, namely SAP 69. From the reading of the section the provisions are peremptory and do not allow for any discretionary powers on the part of the court as to when to stop the proceedings. This was supposed to be either at the instance of the state in the light of the previous convictions of the accused or at the instance of the court having considered that the sentence to be imposed would be in excess of the district court jurisdiction.

The Honourable Judge is thus requested to give direction as to whether the regional court is empowered to consider sentence after the sentencing procedure were initiated before another presiding officer, who is also available to dispose of the matter.

The Honourable Judge is thus requested to give guidance and direction herein.

The accused in this matter is in custody and the matter was remanded until the 14 September 2017 for attorney and sentence.

On the 14th instant the accused as well as the defence attorney were advised of the court's intention to refer the matter for review. The matter was then remanded until 13 November 2017 pending the outcome of the review proceedings.

The defence approached the court with an application that the accused be released on bail while awaiting the outcome of review proceedings and the application was denied as the court was of the view that it will not be interest of justice to release the accused."

[2] On **06 October 2017** a query was forwarded to the Magistrate stating as follows:

“This matter has been sent on special review and the Regional Magistrate is requested to address the following:

- 1. The record of proceedings in district court is incomplete and it is not clear on what basis was the matter sent to the Regional Court.*
- 2. On what basis is the Regional Magistrate making an assumption that the District Magistrate intended to rely on section 114(1)(b) of Act 51 of 1977 when the record is incomplete and no explanation is furnished by the District Magistrate.*
- 3. Is the Regional Magistrate satisfied that the plea of guilty was correctly recorded.”*

[3] The Magistrate replied to the query on **25 October 2017** and it was received by the office of the registrar on **31 October 2017** and only forwarded to me on **6 November 2017**. The Magistrate’s reply is as follows:

“Correctly as pointed out by reviewing Judge that the record from the district court is incomplete, which fact I have also brought to the attention of the reviewing Judge through the covering letter which formed part of the record and wherein I set out my reasons for forwarding the matter for review.

The matter was referred and transferred to the Regional court purportedly in terms of Section 75(3) of Act 51 of 1977 as amended as indicated on the face of the charge sheet.

In regard to the assumption that the district court intended to rely on section 114(1) (b) of Act 51 of 1977 same was reached after perusal of the record and taking note of the prosecutor submission relating to the accused record of previous convictions.

There is no reason or explanation furnished by the District Magistrate. Efforts were done to secure the complete record to no avail so as to satisfy myself as to the reasons why the matter is referred to the regional court.

Since the matter was before me I could not refer same back to the district Magistrate for explanation hence I decided to refer the matter to the Honourable Judge for directions.

As to the plea of guilty am not satisfied that same was recorded correctly as the District Magistrate noted that the accused was found guilty in terms of section 112 (2) of Act 51 of 1977. Furthermore the statement upon which the court relied upon does not set out the full factual basis as to how the offence was committed.

The decision to refer the matter to the Honourable Judge was because I noted undue delay in securing the missing record which was prejudicial to the accused constitutional rights, namely to have his matter finalised speedily.

After receiving the Honourable Judge query I still made request to secure the missing part of the record from the district court and as at the time of responding to the query same was still not available.”

- [4] The accused in this matter was convicted in the district court on one count of theft. He had pleaded guilty and his legal representative submitted a written statement which was read into the record. The said statement stated as follows:

“I the undersigned Nash McNube declare as follows:

I am an adult male person residing at 812 Window Garden

I made this statement freely voluntarily and without being unduly influenced thereto.

I confirm that this statement is the true reflection of my personal knowledge except if otherwise so stated.

I understand the charge against me and the consequences of my plea thereto.

I plead guilty to the charge of theft in that upon the 26th day of July 2017 at Ga-Rankuwa in the district of Madibeng I unlawfully and intentionally stole 13 T-shirts; each valued at R499, 00 with the total value of R6460, 00 the property in the lawful possession of Truworths store or Donald Mathibane.

The following events leading to the commission of the offence and my arrest transpired.

I am unemployed and I am a father of three children, aged 12, seven and three respectively.

I have received a call from the unemployed mother of my three children that the youngest child has been sick for a week and though she was taken to the clinic she was not getting better. And for her to be better she had to see a medical doctor of which I did not have money for.

I know that my subsequent was wrong but I did it anyway. And the reason the only reason why I went to the with the intent to steal was for me to be able to raise, was for me to be able to sell those T-shirts and raise money for medical care of my sick child.

I admit that my actions were wrongful, unlawful and punishable in terms of the law of which I knew during the commission of the offence,

I feel remorse for my actions and pray for mercy from the honourable court,”

- [5] After the statement was read into the record the Magistrate stated that the accused was found guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977. Thereafter the state proved previous convictions against the accused which comprised of several convictions of theft. The defence proceeded to address the court in mitigation of sentence. During the address by the state in aggravation the state prosecutor applied to court that the accused be referred to the regional court for sentence. The record is incomplete and does not indicate what order was made by the Magistrate in respect of the application by the state prosecutor. On the next appearance the matter was transferred to the regional court in terms of section 75(2) of the Criminal Procedure Act for sentence. The Regional Magistrate as indicated in the request for special review raised concerns with the fact that the Magistrate had already commenced with the sentence

proceedings and that the Magistrate found the accused guilty in terms of section 112(2) of the Criminal Procedure Act when there is no factual basis for such.

[6] Section 112(2) of the Criminal Procedure Act provides that:

“(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.

[7] In the matter of **S v Mshengu 2009 (2) SACR 316 SCA** at paragraph 15 the following was stated regarding statement in terms of section 112(2) of the Criminal Procedure Act:

“The primary purpose of the written statement in terms of s112 (2) is to set out the admissions of the accused and the factual basis supporting his or her guilty plea”.

[8] The accused in this matter has been charged with the offence of theft. **J.R.L. Milton, South African Criminal Law and Procedure, Vol 2, 3rd Ed** states the following about theft at page 617:

“In South African law it is not sufficient that the accused intentionally effected a contrectatio of the property. In order for there to be the mens rea of theft the contrectatio must be accompanied by an intention permanently to deprive the owner of the benefits of his ownership.”

The accused in this matter admitted all the elements of the offence of theft in his statement and admitted that his actions were wrongful and

punishable in terms of the law. In his statement he further explained what led him to commit the said offence. On this statement there was nothing else to be proven by the state for the court to be satisfied that the accused indeed committed the offence of theft. In my view the statement by the accused in terms of section 112(2) of the Criminal Procedure Act is proper and should be accepted.

- [9] The record of proceedings indicate that the prosecutor during the address in aggravation of sentence made a submission to court that the accused be referred to the Regional Court for sentence. It is not clear what order was made by the Magistrate. It is submitted by the Regional Magistrate that because of the submission by the prosecutor the assumption is that the matter was referred to the Regional Court in terms of section 114 of the Criminal Procedure Act.

- [10] Section 114 of the Criminal Procedure Act provides that :

“114. Committal by magistrate’s court of accused for sentence by regional court after plea of guilty

- (1) *If a magistrate’s court, after conviction following on a plea of guilty but before sentence, is of the opinion-*
- (a) *that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate’s court;*
 - (b) *that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate’s court; or*
 - (c) *that the accused is a person referred to in section 286A (1),*

[Para. (c) added by s. 18 of Act 116/93] the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.

- (2) Where an accused is committed under subsection (1) for sentence by a regional court, the record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court and the plea of guilty and any admission by the accused shall stand unless the accused satisfies the court that such plea or such admission was incorrectly recorded.*
- (3)*
 - (a) Unless the regional court concerned-*
 - (i) is satisfied that a plea of guilty or an admission by the accused which is material to his guilt was incorrectly recorded; or*
 - (ii) is not satisfied that the accused is guilty of the offence of which he has been convicted and in respect of which he has been committed for sentence, the court shall make a formal finding of guilty and sentence the accused.*
 - (b) If the court is satisfied that a plea of guilty or any admission by the accused which is material to his guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence of which he has been convicted and in respect of which he has been committed for sentence or that he has no valid defence to the charge, the court shall enter a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that any admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.*
- (4) The provisions of section 112 (3) shall apply with reference to the proceedings under this section."*

[11] In this matter the charge sheet indicates that the matter was referred to the Regional Court in terms of section 75 (2) of the Criminal Procedure Act. Section 75 (2) provides that:

“(2)

- (a) *If an accused appears in a court which does not have jurisdiction to try the case, the accused shall at the request of the prosecutor be referred to a court having jurisdiction.*
- (b) *If an accused appears in a magistrate’s court and the prosecutor informs the court that he or she is of the opinion that the alleged offence is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate’s court but not of the jurisdiction of a regional court, the court shall if so requested by the prosecutor refer the accused to the regional court for summary trial without the accused having to plead to the relevant charge. [Subs. (2) amended by s. 3 of Act 86/96]”*

[12] The provisions of section 75 (2) are not applicable in this matter as the accused had already pleaded and only at the sentencing stage did the prosecutor make the submission that the accused be referred to the Regional Court for sentence. It is my view that looking at the circumstances of this matter, the relevant section is section 114 of the Criminal Procedure Act and the Regional Magistrate is correct in her conclusion that the matter was transferred to the Regional Court in terms of section 114.

[13] At the time the matter was referred to the Regional Court the District Court Magistrate had allowed the defence and the state to address in mitigation and aggravation of sentence. It is on this basis that the Regional Magistrate is of the view that the District Court had commenced with sentencing proceedings and needs guidance as to

whether the Regional Court can proceed to sentence the accused or the matter should be referred back to the District Court to continue with sentence.

- [14] The prosecutor in addressing the court and submitting that the accused be referred to the Regional Court for sentence did not give reasons as to why that should be the position. The record is also incomplete and there are no reasons furnished by the District Court Magistrate why the matter was referred to the Regional Court for sentence. However from the record that has been supplied, before the prosecutor made the submission of referral, the following appears on the record:

“Your worship the accused person has been given a lot of chances by given a suspended sentence. And further your worship the accused person ...(inaudible) he was given a direct imprisonment, and he was released on the 5th day of July 2016 he was released on parole. Your worship before his parole has even ended he committed again. His parole was supposed to end on the 23rd day of January 2017.

Before it can even end he committed an offence on the 25th day of January 2017. That on itself it seems that indeed the accused person does not have respect for to the law. And further your worship state makes a humble submission that when sentencing the court must pass a sentence that will suit the offender as well as the offence.”

- [15] The above address by the prosecutor in relation to the previous convictions of the accused can be the only reason why the submission was made that the accused be referred to the Regional Court for sentence. Therefore section 114(1) (b) is applicable and the matter on this basis alone was rightfully referred to the Regional Court.

[16] The wording of the section is “*sentence by the Regional Court*”. The section does not refer to sentence proceedings. The accused has not been sentenced and the fact that the District Court heard submissions in relation to sentence does not mean that the accused has been sentenced. There is nothing preventing the Regional Court from commencing afresh with evidence in mitigation and aggravating of sentence as a sentencing court before imposing a suitable sentence. Therefore the Regional Court should proceed to sentence the accused accordingly.

Order

[17] Consequently, the following order is made:

1. The plea of guilty by the accused is in accordance with justice and should be accepted;
2. The sentence proceedings are to commence afresh in the Regional Court.

J. T. DJAJE
JUDGE OF THE HIGH COURT

I agree

N GUTTA
JUDGE OF THE HIGH COURT

DATE: 16 November 2017