Reportable:	NO
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Circulate to Regional Magistrates:	NO

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

High Court Case No: HC09/2024
Magistrate Case No: RE2146/2023

In the matter between:

THE STATE

and

VUSI MAVUSO

Handed down: 07 June 2024

REVIEW JUDGMENT

DIBETSO-BODIBE AJ

Introduction

[1] This is an automatic review in terms of Section 302(1)(a) of the Criminal Procedure Act 51 of 1977 ('the CPA') from the Magistrates' Court held at Ga-Rankuwa (sub-District of Madibeng).

[2] On 27 October 2023, the accused Vusi Mavuso, a 39 year old male pleaded guilty to a charge of theft of four(4) KitKat chocolates weighing 135 grams to the total value of R167.96. The chocolates were allegedly stolen from Shoprite Supermarket at Kgabalatsane, Madibeng.

[3] On 16 November 2023, the accused was sentenced to 18 months imprisonment and warned of the possibly of being declared a habitual criminal in terms of section 286(1) of the CPA and declared unfit to possess a firearm in terms of section 103(2) of the Firearms Control Act 60 of 2000.

The explanation of the right to legal representation

[4] At the commencement of the proceedings regarding the accused's right to legal representation, the following appears from the record:

"Mr Mavuso… I know this has been asked of you many times but now we… need to on record just confirm that you understand that you have the right to have Legal Aid for free to assist you through this process as a legal representative or lawyer at own expense or you can present the case of your own. Did you understand that you had the options and which one did you choose?" To this end the accused replied "I will conduct my own defence" and immediately thereafter the trial court called on the State to proceed to put the charge to the accused."

[5] It is trite that in terms of section 35(3)(f) of the Constitution of the Republic of South Africa, 1996 that every accused person has a right to a fair trial, which includes the right to choose, and be represented by, a legal practitioner, and to be informed of this right promptly, and (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. From the above extract it is not clear whether the accused understood this right before making an election to conduct his own defence. It is the duty of a court to ensure that an accused fully understands this right. Lip service does not suffice. This is so given the peculiar situation of an unrepresented accused in the atmosphere of a courtroom where legalese prevails, and an accused is left to fend for himself.

[6] In *S v Cornelius* & Another (SS135/2006) [2007] ZAWCHC 54 (14 September 2007), the following was stated in respect of enforcing the right to legal representation by a trial court:

"[13] As a result when an accused person is advised of his/her right to legal representation, the distinction between three forms of the said right should be clearly made in order for the accused to understand them.

> Indeed the Constitution does not only confer the right to a legal representation but it also requires, in peremptory terms, that the accused be informed promptly of the said right. It must be borne in mind that the exercise of the right to legal representation is of critical importance in any trial as it is the only source through which the other rights can be effectively exercised.
>
> [14] Furthermore it is not unusual to come across recording indicating that, in spite of the accused having been advised of his rights to legal representation through the Legal Aid Board, they would have chosen to act in person even where they faced serious charges. Although it ultimately depends on the individual decision of the accused whether or not to have legal representation, in some cases such decision is based on misconception or misunderstanding of the system relating to free legal representation. It is therefore incumbent upon Magistrates to go an "extra mile" in cases where the accused declines legal representation particularly in cases of serious charges. They must find out what motivated the decision to act in person in the light of complexities in court procedures. Failure to investigate the reason for declining free legal representation might defeat the very objects of the right to a fair trial entranced in Section 35 of the Constitution."

[7] A thorough explanation of an accused's constitutional right to legal representation is a cornerstone of a fair trial. Failure by a presiding officer to tender such explanation, may result in an irregularity which may vitiate the proceedings, especially where the accused would be prejudiced by such failure. In the present matter, the Magistrate failed to thoroughly explain to the accused his constitutional right. This resulted in real prejudice to the accused who was ultimately sentenced to direct imprisonment. In my view, this was undoubtedly a gross irregularity which cannot be condoned.

The plea proceedings

[8] The next aspect to consider is the conduct of the plea proceedings in terms of section 112(1)(b) of the CPA which in relevant part provides that where an accused at a summary trial in any court pleads guilty to the offence charged,... and the prosecutor accepts that plea – the presiding... magistrate shall,... 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. The transcribed record reveals the following in this regard:

> "Court: *Okay then you hear what the State alleged you did in you own word tell me if you did anything, what?*
>
> Accused: *My mother was at hospital at Brits, Your Worship, and for more than seven days and I had a quarrel with my sibling.*
>
> Court: *Sir please, this is an alleged theft.*
>
> Accused: [Indigenous language]
>
> Court: *No Sir, I do not know what you are talking about. Did you go into Shoprite or not?*
>
> Accused: *I went your Worship, to Shoprite and I stole the said chocolates four of them, big chocolates.*
>
> Court: *Okay the State alleges it is KitKat's, do you agree with them or not? Those big ones?.*

Accused: *Yes, your Worship.*

Court: *And then did you take it off the rack and how did you go about it or not?*

Accused: *I went into Shoprite your Worship, wearing cycling shorts inside the pants then went to the shelves took them off the shelves and hid them on my person.*

Court: *Okay you were I presume in the cycling shorts?*

Accused: *Correct."*

[9] Firstly, the Magistrate demonstrated impatience to the unrepresented accused. When the accused was ready to narrate what happened in his own words, the Magistrate was there and then interjected by the presiding officer. This conduct of the trial court, in my view, had a great potential to destabilise and bring fear of wrongdoing upon the accused who thenceforth may wear a demeanour pleasing to the court instead of being sober minded and independent.

[10] Secondly, it is clear from the said extract that once the Magistrate interjected, leading questions were put to the accused rather than affording the accused an opportunity of explaining what happened in his own words. Leading questions should as far as possible be avoided as was stated in *S v Buxeka* (R82/2021) [2021] ZAFSHC 255 (28 October 2021) - referenced from *S v Mkhize* 1981 (3) SA 585 (N) 586 (H):

"[10] The purpose of questioning the accused is to elicit facts from him regarding the basis upon which he is pleading guilty. Ideally, he must be given space to explain what happened so that the factual basis of his guilty plea can be established. It is improper for the magistrate to guide him in that exercise and lead him with readily prepared answers for him to admit his guilt..."

[11] In the circumstances, the way the questioning was conducted through leading questions, on its own constitutes a gross irregularity which vitiates the proceedings.

The sentencing proceedings

[12] After the accused pleaded guilty, he was found guilty as charged and the State produced to the Magistrate a record of the previous convictions alleged against the accused as reflected in form SAP69 as follows:

"22/02/28 – Convicted of contravening the Drug Trafficking Act and paid Admission of Guilt fine of R50.00

09/02/2010 – convicted of theft and sentenced to four months imprisonment wholly suspended for five years

19/12/2012 – convicted of theft and was cautioned and discharged.

31/12/2012 – convicted of theft and sentenced to six months imprisonment or R3000.00 fine

21/06/2013 – convicted of presumably stolen property (sic) and sentenced to one year imprisonment or R3000.00 fine

27/07/2015 – convicted of theft and sentenced to three months imprisonment or R900.00 fine

05/10/2016 – convicted of theft and sentenced to eighteen months imprisonment or R6000.00 fine

23/11/2016 – convicted of theft and sentenced to one month imprisonment wholly suspended."

[13] In an attempt at analyzing the accused's previous convictions, the Magistrate was once again abrupt in ascertaining whether the accused was imprisoned and the period he served of such imprisonment. Thereafter and without requesting the State to provide more information relating to the previous convictions, the Magistrate proceeded to deal with mitigation of sentence.

[14] Based on the number of previous convictions, the Magistrate warned the accused of the possibility of being declared a habitual criminal. Although this was only a warning, the Magistrate failed in going the extra mile to ascertain the circumstances under which the previous offences were committed. In my view, this mechanical approach premised only on the number of previous convictions and the summary warning of being declared a habitual criminal, constituted an irregularity which infringed upon the accused's right to a fair trial.

[15] During mitigation of sentence the accused stated that he wanted to continue working since his cousin who owned garages promised him employment once he was released from prison. The Magistrate dealt with this issue as follows:

"Court: ... we need to get cousin here, cousin must also talk to the correctional official who will interview as well, that is not going to happen today...

Accused: My cousin cannot even visit me, your Worship.

Court: Ja well the correctional officer will then go and see him, it is fine.

Court: Hold onto the cousin's number, we are not going to get the cousin here on Tuesday, it is too short a notice but you need to then have that interview with the correctional official and you need to tell him cousin's name, details, where the business is whatever and correctional guy will go check that you have got a job or not or whatever and he has to also go and check your residence how it looks over there and what they call monitorable if it is monitorable and then they have to suggest certain programs and that is unfortunately the only way I am going to be able to do some sort of system that can keep an eye on you for your own good.

Accused: Understood."

[16] On 27 October 2023, the Magistrate adjourned the proceedings for a Correctional Services Officer to interview the accused for consideration of correctional supervision as a sentence, and to attend the accused's residence to establish if it was suitable for monitoring purposes during correctional supervision. The Correctional Officer was also to visit the accused's cousin to confirm the availability of employment for the accused should he be released on correctional supervision.

[17] On 16 November 2023, the State informed the Magistrate that a Correctional Services Suitability Report was received which was negative. The following appears from the record in this regard:

> *"According to the recommendations the accused is not an eligible candidate to be subjected to correctional supervision in terms of Section 276(1) of the Criminal Procedure Act as a sentence. And his mother is not able to accommodate him.*
>
> *Court: Thank you for the summary. That is indeed the summary of the report basically you do not qualify, there is no monitorable address after the correction officials have checked these things.*
>
> *Alright the big thing that we were dealing with over here is 2.4: Treatment Possibilities 2.4(a) of the correctional Services report indicates the following:*
>
> *The accused does not have any support system so it is impossible for him to be placed under correctional supervision, and (b) prevention for further criminalization the accused has nine previous convictions and he did rehabilitation before for substance abuse problem, nothing works if he experience any challenges he always went back to abuse substances.*
>
> *So they feel they cannot handle your situation and therefore you do not qualify. No we do not want to read the whole report, that is the main summary, thank you."*

[18] From the above extract, the Magistrate accepted the report as is and excluded any possibility of leading evidence by the mother or the cousin of the accused, and the probation officer herself. The Magistrate was not bound to accept the report as is. The purpose of

the suitability report was to assist the Magistrate in the determination of a suitable sentence. The Magistrate was to be satisfied that the report spoke to all the relevant factors affecting the accused. This included the issue of the employability of the accused. Nothing is said in the report regarding the issue, yet the Magistrate accepted the report and without informing the accused why the interview with his cousin did not take place.

[19] Section 274 of the CPA confers on an accused the right to place mitigating factors before a court. It is the duty of a court, to explain this right thoroughly to an undefended accused and to assist him during the process of mitigation. The wisdom behind this reasoning is because there are various ways in which this right may be exercised, including calling witnesses to testify. The Magistrate did not explain this right to the accused, nor did he assist him during mitigation. This constitutes a further gross irregularity in the proceedings which amounts to a failure of justice.

The declaration of unfitness to possess a firearm

[20] The accused was declared unfit to possess a firearm in terms of section 103(2) of the Firearms Control Act 60 of 2000. The Magistrate stated as follows:

> *"Alright then we also have to do a firearms enquiry. Section 103(2) (sic) Act 60 of 2000... we must decide whether you are competent to apply to possess a legal firearm.*
>
> *Talk to me is there any inputs on that?*

Accused: I need a firearm your Worship. I want to become the SBV Security guard and they offer a firearm as well in the job.

Prosecutor: Your Worship, the State is making an application in terms of the Firearms Control Act for the accused to be declared unfit to possess a firearm.

Court: Alright you are not a violent person, with all of this drugs now this is something where we have to build a bit of mercy into the situation, with all of this drug stuff going et cetera et cetera, we have never had you before court for anything violent, it is obviously not in your nature and let us give you benefit as far as that is concerned and the only way I can do that is to say that you are found "not unfit" to possess a firearm… but I am going to find you "not unfit to possess a firearm and leave it at that."

[21] The court *mero motu* addressed the accused on the possibility of declaring him unfit to possess the firearm, wrongly so, in terms of section 103(2) of the Firearm Control Act and thereafter mitigated on behalf of the accused that he is not a violent person and concluded that he was going to find the accused *"not unfit to possess a firearm"*. This approach is wrong in law.

[22] In *S v Thobela* (130/2019) [2020] ZAGPJHC 64; 2020 (2) SACR 222 (GJ) (12 March 2020), Carelse J (as she then was) stated as follows regarding the approach to section 103 of the Firearms Control Act:

"[13] In terms of section 103(1)(g) **section 103(1)(g)**, unless the court determines otherwise a person becomes unfit to possess a firearm if convicted of an offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine.

Therefore, a person is *ex lege* (by operation of the law) automatically declared unfit to possess a firearm. In *S v Lukwe* **2005 (2) SACR 578** *(W) at page 580a-d,* Borchers J, in the context of a conviction of Theft where a term of imprisonment was wholly suspended held that:

"The conviction and sentence imposed bring the matter within the ambit of **s103(1)** of the **Firearms Control Act 60 of 2000**, which reads as follows:

'Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of -

(g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine.

In my view, the sentence of 12 months' imprisonment falls within these provisions despite the fact that it was wholly suspended.")

[14] **Section 103(2)** of the **Firearms Control Act applies** to cases where the convicted person does not fall into the categories listed in subsection 1, but falls into categories listed in schedule 2 of the Act. Schedule 2 includes the offences of high treason; sedition; malicious damage to property; entering premises with the intent to commit an offence under either the common law or a statutory provision; culpable homicide; and extortion. This subsection gives the court a discretion to decide whether to declare a person unfit to possess a firearm.

[15] It is therefore clear that once an accused person is convicted of an offence involving dishonesty, for example, theft as in the present matter and sentenced to imprisonment without the option of a fine, whether suspended or not, he is automatically declared unfit to possess a firearm, unless the court determines otherwise. In the present matter, the magistrate did not hold an enquiry to determine otherwise because the accused was previously declared unfit to possess a firearm. The state submits that the magistrate correctly held that there was no need to hold an enquiry since the accused person was previously found unfit to possess a firearm.

...

[18] In the unreported case of *Godfrey Kagiso Motau, Review 36/2018* of the North West Division of the High Court, Mahikeng, handed hown 0n 30 January 2019, Petersen AJ, stated as follows at paragraph 25:

"The learned district magistrate submits that the record was transcribed incorrectly and should have reflected that he did not hold an enquiry as the accused had previously been declared unfit to possess a firearm. In my view, the basis for this submission does not accord with the purport of the legislation. The accused may have been declared unfit to possess a firearm previously but that does not mean no enquiry should be held when further convictions calling for an enquiry materialise. The **Firearms Control Act has** no provision supporting the view of the learned district magistrate. The declaration of unfitness to possess a firearm remains in place for a period of 5 years' and not indefinitely. In terms of **section 103(6)** of Act 60 of 2000 which provides: "Subject to section 9(3)*(b)* and after a period of five years calculated from the date of the decision leading to the status of unfitness to possess a firearm, the person who has become or been declared unfit to possess a firearm may apply for a new competency certificate, licence, authorisation or permit in accordance with the provisions of this Act. It is therefore imperative that an enquiry be held as required by **section 103(1)** or (2) of the **Firearms Control Act on** each occasion an accused is convicted."

I agree with the reasoning of Petersen AJ in *Motau* and the submissions of the Magistrate.

[19] In my view and as a general rule the approach proposed by Borchers J at page 580f-581a of *Lukwe* should apply on each occasion an accused is convicted:

"... Where the matter is governed by **s103(1)**, the accused is automatically deemed to be unfit to possess a firearm unless the court determines otherwise. The legislation does not expressly require the court to hold an enquiry into the accused's fitness, but, in my view, particularly where an accused is

unrepresented, **the court should draw the accused's attention to the provisions of s 103(1) and invite him, if he wishes to do so, to place facts before the court to enable the court to determine that he is indeed fit to possess a firearm**..."

(emphasis added)

[23] The Magistrate erred in applying the provisions of section 103(2) of the Firearms Control Act and in his approach to affording the accused an opportunity why he should not remain unfit to possess a firearm.

The sentence

[24] The sentence of eighteen (18) months imprisonment may appear harsh given that the accused last previous conviction was some seven (7) years earlier, and in light of the statement by the Magistrate that the accused *"have stayed out of courts for seven years which is not bad considering your history. I have to recognize that. So, I have to give you credit for that"*. Given the conclusion that I reach in this matter, nothing more needs to said in this regard.

Conclusion

[25] As stated in *Buxeka supra*: *"A criminal trial is not a game where the magistrate plays the role of an umpire. He has to ensure the fairness of the whole proceedings. The need for judicial officers to assist unrepresented accused throughout the trial cannot be overemphasized... For example, in the present matter the accused probably served five months in prison in violation of his constitutional right to freedom of movement as a result of irregular proceedings."*

[26] The proceedings are riddled with irregularities occasioned by the Magistrate, who failed to give effect to constitutional rights of the accused. The Magistrate, by way of summary, did not encourage the unrepresented accused to seek legal representation and failed to assist him in the conduct of the plea and sentence proceedings. The irregularities are incapable of being condoned.

[27] The most prudent approach to the matter would be to set aside the conviction and sentence and remit the matter to the Magistrates Court for trial *de novo* before another Magistrate.

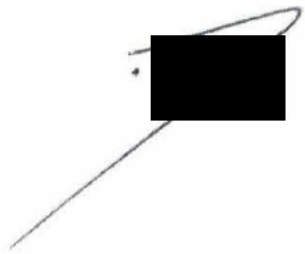
Order

[28] In the premises, the following order is made:

1. The conviction and sentence are reviewed and set aside.

2. The matter is remitted to the Magistrate's Court to commence *de novo* before a Magistrate other than Magistrate Mr Van Rooyen.

3. The State is to make arrangements for the appearance of the accused within seven (7) days of this order, at the Ga-Rankuwa Magistrates' Court.



O Y DIBETSO-BODIBE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree.

A H PETERSEN
JUDGE OF THE HIGH COURT
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