REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

HIGH COURT REF NO: 0503232

MAG COURT CASE NO: 3/1023/2005

MAG COURT SERIAL NO: 180/05

In the matter between:

THE STATE Applicant

and

RICARDO FISHER Defendant

JUDGMENT: 30 JANUARY 2007

NTSEBEZA, AJ

INTRODUCTION

[1] This is a review matter, one of those unfortunate ones that fell through the cracks inasmuch as it was referred, by the senior magistrate of the Wynberg Court, in Cape Town, as a matter for review, after the accused had been sentenced on or about 1 November 2005. When the matter came routinely before me for review, I raised several queries which were also informed by the Wynberg Senior Magistrate's request for future guidance for presiding officers when confronted with cases the nature of which forms the subject matter of this judgment.

BACKGROUND FACTS

[2] The accused, one Ricardo Fisher, was arraigned before the Magistrate's Court in Wynberg on 1 November 2005, on a charge of contravening Section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992. The allegation against him was that he had in his possession an undesirable dependence producing substance, to wit, one straw containing methamphetamine. It is alleged that the accused elected to proceed with the trial without the services of a legal representative. He pleaded guilty to the charge. Thereafter the prosecutor requested the court to deal with the matter in terms of Section 112(1)(a) of Act 51 of 1977, the Criminal Procedure Act (the Act). That request was taken as an indication by the prosecutor that he accepted the guilty plea by the accused in terms of that section.

[3] The presiding officer, a relief magistrate, purported to proceed by way of Section 112(1)(a) of the Act, and convicted the unrepresented accused summarily on his

guilty plea. Thereafter, the State proceeded to prove a number of previous convictions, including three such convictions which related to possession or use of dagga, a species of prohibited dependant producing substances. In sentencing the accused to a fine of R500,00, the Magistrate did not impose, as an alternative sentence, a period of imprisonment. He/she also granted permission for a deterred fine in terms of Section 297(5) of the Act. The dependence producing substance (hereinafter referred to as "Tik") was ordered forfeited to the State.

[4] Section 112(1)(a) and (b) provide as follows:

> "*(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea –*
>
> *(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount* determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and –*
>
> (i) *impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time in the Gazette; or*
>
> (ii) *deal with the accused otherwise in accordance with law;*
>
> *[Para (a) substituted by s 4(a) of Act 109 of 1984, by s 7(a) of Act 5 of 1991 and by s 2 of Act 33 of 1997.]*

> *(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount* determined by the Minister from time to time by notice in the Gazette,, or if requested thereto by the prosecutor, 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, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.*
>
> *[Para (b) amended by s 4(b) of Act 109 of 1984 and substituted by s 7(b) of Act 5 of 1991 and by s 2 of Act 33 of 1997.]"*

[5] Commenting on this section, with reference to a number of cases, the learned authors Du Toit *et al* in their celebrated *Commentary on the Criminal Procedure Act*, state that Section 112(1)(a) authorizes a presiding officer to convict an accused on his (or her) bare plea of guilty whenever such presiding officer is of the opinion that the offence in question does not merit certain kinds of punishment or a fine exceeding R1 500,00.[1] In formulating his/her opinion, the presiding officer is largely guided by the nature and seriousness of the offence. Section 112(1)(a) is intended for minor matters – statutory offences as well as common law offences where circumstances obviously warrant a sentence falling within the ambit of this particular section. It is, however, still the duty of the presiding officer to decide whether the offence is of such a trivial nature that it calls for a conviction solely on a plea of guilty. After conviction in terms of Section 112(1)(a), evidence may be received for purposes of sentencing.

[1] (GN R239 in GG 24393 of 14 February 2006)

[6] It seems to me therefore that Section 112(1)(a) was designed to facilitate an acceptance of a plea by the prosecutor in circumstances which would not provide for judicial questioning of the accused, but where the presiding officer would be competent to impose a light sentence in spite of the fact that the relevant previous convictions which the accused may prove after conviction may call for a more severe sentence.

[7] In the case under review, for which unfortunately the relief magistrate gave no reasons for his judgment and sentence, the matter was compounded by a forensic report of the experts who analysed the straw alleged to have contained methamphetamine. This report, which became available after the matter had been finalized, in fact stated that the straw did not contain methamphetamine or any substance listed under the schedules to both Act 140 of 1992 and/or Act 101 of 1965. I had then queried whether the relief magistrate had judiciously exercised his/her discretion in invoking the provisions of Section 112(1)(a) of the Act, due regard being had to the nature of the offence and the facts thereof. I then asked the office of the Director of Public Prosecutions in Cape Town to let me have the benefit of his own views. I am deeply indebted to Adv RJ De Kok of that office who requested a Deputy Director of his staff, one Adv Sakala to formulate an opinion that would be responsive to both my queries and the request for future guidance that came from the Wynberg Senior Magistrate.

[8] Adv Sakala proceeds, in giving his opinion, by stating that Section 112(1)(a) of the Act provides a machinery for the swift and expeditious disposal of ***minor criminal cases*** (emphasis provided) on the basis of an accused's guilty plea. The trial court is ordinarily not obliged to question the accused, with a view to satisfying itself if the offence was actually committed by the accused or not. It accepts his or her plea at face value. According to Adv Sakala, the accused thus loses his/her protection, afforded by the procedure envisaged in Section 112(1)(b), but is not exposed to any really serious form of punishment, in that the court may not impose a sentence of imprisonment or any other form of detention without the option of a fine, and any fine imposed must not exceed R1 500,00. Adv Sakala cited several authorities in support of his submissions, notably **S v Aniseb & Another** 1991 (2) SACR 413 (Nm); **S v Cook** 1977 (1) SA 653 (A).

[9] Adv Sakala's opinion is that a trial court cannot convict an accused person merely on his or her guilty plea where the gravity of the offence is such that the procedure in terms of Section 112(1)(b) of the Act should rather be followed. The reasoning is that even though the quantity of the alleged "Tik" was relatively small, that in and of itself should not have detracted from the seriousness with which possession of a dependence producing substance (in this case Tik) should have been regarded. The fact that the allegation was that the accused was charged with possession of a dependence producing substance, a serious offence on the face of it, and especially if that accused person is, as was the case here, unrepresented, a court should not normally accept the ***ipse dixit*** of an unrepresented accused on his/her guilty plea.

[10] It immediately becomes the duty of the court, in such a case, to ensure on some basis, that in pleading guilty, the accused is aware not only of the nature of the offence but of the nature of the consequences that might follow a guilty plea. What is clear is that the court has a duty to satisfy itself of the guilt of the accused, and that the court cannot abdicate this duty, when it may well be that an unrepresented and unsophisticated accused has admitted having committed a crime the seriousness of which fell outside his or her capacity to comprehend. This will lead to a failure of justice.

[11] In the present case, had the magistrate been alert to the fact that possession of a dependence producing circumstance is, in and of itself, a serious offence, on the face of it, he/she[2] would have sought to establish whether the accused, unrepresented as he was, clearly understood what a dependence producing substance was, and what the consequences of a plea of guilty in such circumstances would be. Besides, as already stated, a conviction on a plea of guilty to possession of a drug or a dependence producing substance has serious consequences that could not be dealt with to finality if the magistrate was not satisfied that the accused had pleaded guilty, fully aware of the consequence of his actions.

[12] As it turned out, in this case, the so-called "Tik", a prohibited substance, turned out, after analysis, not to have been a drug possession of which would be visited

[2] It is not clear from the review papers whether the relief magistrate was male or female

by the heavy sanctions prescribed in the Act. This is a sad case, one in which the accused, for whatever reason, found himself pleading guilty to an offence without him quite appreciating the consequences of his action. How in a case involving a charge of possession of a prohibited drug an accused can be said to have "elected" to proceed to trial without legal representation baffles me.

[13] Once again this is a case that calls into question the efficacy of our judicial system. It is a case where the promise of legal representation enshrined as a protected right in Section 35(3)(g) of our Constitution[3] is so seriously undermined as to make the right to legal representation sound hollow and empty, and no more than a paper right. Whilst there may well be merit in speeding up the process of dispensing with justice, officers of the Court, whether they are presiding or prosecuting, must still ensure that in their understandable haste to "finish" cases, they still have a more onerous duty, namely, that of ensuring that justice is done. In this case, the insult to injury is the fact that forensic evidence later established that the accused had pleaded guilty to no crime at all.

[14] This case is a serious indictment of our judicial system all round, and points us, once again, to pitfalls which we ought to avoid as those entrusted with the delicate duty of dispensing with justice.

[15] It is clear, therefore, that the conviction and sentence cannot stand and must be set aside. The matter is remitted to the office of the Director of Public

[3] No 108 of 1996

Prosecutions for his office to investigate whether or not the accused ended up paying the deferred fine. It stands to reason that if such fine was paid, it should be returned to the accused. In the interest of justice, the money ought to be returned with interest at the prescribed rate from the date of such payment by the accused to when the State returns it to him. However, this judgment would neither be the time and place for me to make that kind of an order. I make the pronouncement, however, as my own indication of what justice would call for in a case where the State system, for whatever reason, and at whatever level, has failed an unrepresented accused, including the delay that has been occasioned by the slow delivery of this review judgment, for which I must also take part of the blame.

[16] The conviction and sentence are set aside.

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NTSEBEZA AJ

I concur, and it is so ordered:

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YEKISO J