

SOUTH AFRICA / JUDGMENT

Hoosen v S (412/22) [2023] ZAWCHC 47 (6 March 2023)

[2023] ZAWCHC 47

COURT

Western Cape High Court, Cape Town

BEFORE

DM Thulare, MI Samela

CASE / FILE NUMBER

412/22

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Ref No: 412/22

Case No: 217/2018

Magistrate Serial No: 02/2021

In the matter between

DEEN HOOSEN

vs

THE STATE

REVIEW JUDGMENT 06 MARCH 2023

THULARE J

- [1] It seems that there is a route to justice which is only available to those who knows or knows someone who knows a Senior Magistrate at the Magistrates' Courts, and by this proximity have access not only to the contents of the case dockets, but also to the records of the Department of Justice and Correctional Services, including the benefit of submissions by Senior Magistrates or Heads of Magistrates' Courts made to a Judge. This matter is a review of a conviction and sentence by one of such privileged few. Regrettably, these kinds of matters confirm that the path to justice is not accessible to all. Neither applicants in these types of matters in their founding affidavits, nor the Senior Magistrates or Heads of Courts who prepare memoranda in these types of matters, explain how the affidavit of the applicant landed on that Magistrate's desk, nor how the applicants had access to State records.

- [2] The issue is whether the proceedings against the applicant were in accordance with justice.
- [3] In her memorandum, the senior magistrate said that all court documents related to this matter have already been destroyed. Constable Mcebisi Nzondo was doing crime prevention on foot patrol on Saturday 21 March 2015 at around 23H10 in civilian clothing and was walking along Central Drive in Camps Bay. He noticed a vehicle parked on the side of the road. The light inside the vehicle was on and he noticed a white man sitting inside the vehicle on the driver's seat. As he walked passed he could see the man preparing what seemed to him like a zol of dagga. Nzondo knocked on the window to draw the attention of the man and then asked the man to open the door. The driver opened the door. Nzondo introduced himself to the man and showed the man his appointment certificate as a member of the police.
- [4] Nzondo then asked the man what the man was doing and the man, the applicant, was apologetic and began pleading that it was a small amount of dagga and that he did not smoke it regularly but only sometimes. Nzondo asked for permission to search the vehicle, which was granted and he searched the vehicle further and found a minimal amount of dagga inside some gold dagga smoking material. Nzondo arrested the applicant and took him to Camps Bay SAPS where he was detained. Nzondo booked the dagga into the SAP 13 register. An admission of guilt amount was determined at R150-00. The applicant paid the admission of guilt and was released. According to the papers before me, the applicant's rights as envisaged in section 35 of the Constitution were explained to him, including that he was not compelled to make an admission which could be used as evidence against him. He had signed a certificate that he had been informed of his rights and that he understood the contents thereof.
- [5] In this application the applicant concedes that he was arrested for possession of dagga. According to him, before he got into the van, he was told that he might get his friends to bail him out for R150-00. This was repeated at the police station where he was further told that he either stayed in the cells until Monday morning or he paid the bail fee. He was terrified and no other option was given to him. He was 19 years at the time. His friend, who was also arrested, had been robbed in the van. He was then told to sign papers as he was going to pay the bail fee without knowing that he was going to sign an admission of guilt form. He was under the impression that he had paid bail and he did not know that he was actually paying an admission of guilt. It was not explained to him that by paying the admission of guilt he would have a criminal conviction and a criminal record. If he had known

that he was paying an admission of guilt which would lead to a criminal record, he would not have paid the admission of guilt. It was only in 2016 when he applied for a job that he discovered that he had a criminal record. He is now a BCom student at Varsity College and the criminal record will have a negative impact on his future.

- [6] Section 304(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) provides as follows:

“Procedure on review 304(4) If in any criminal case in which a magistrate’s court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.”

- [7] It is in the same league as the one in *S v Elgin* 2022 (1) SACR 325 (WCC) at para 12 where it was said:

“The conviction and sentence of the accused followed upon her payment of the admission of guilt fine paid at the police station. It was a consequence of the essential particulars of the notice which was surrendered to the clerk, entered by the clerk onto the criminal record book for admission of guilt as a consequence of which she was deemed to have been convicted and sentenced by the court [section 57(6) of the Act]. A magistrate at the Wynberg Magistrates’ Courts examined the documents and did not find any reason to set aside the conviction and sentence, as envisaged in section 57(7) of the Act.”

- [8] The facts set out in the accused’s affidavit, more specifically the consequences of the admission of guilt and the failure to explain such, are new facts were not before the magistrate at the time. This resulted in the failure of justice [*Elgin* para 20 and 21]. It stands to be repeated that the aim of the Chapter, that is, Chapter 8 in the Act where the provisions of an admission of guilt appears, is to eliminate unnecessary formalities by making it possible for someone who has committed a relatively minor offence to admit guilt, pay a fine and avoid formal court proceedings. It was not intended to assist the State amass undeserved criminal convictions and cloth trivial misdemeanours with the gravity of a criminal record from a court of law.

- [9] For these reasons I would make the following order:

1. The conviction and sentence is set aside.
2. The amount paid as admission of guilt should be refunded to the accused.
3. The accused may be prosecuted in the ordinary course.

DM THULARE

JUDGE OF THE HIGH COURT

I agree

MI SAMELA

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