

SOUTH AFRICA / JUDGMENT

S v Elgin (274/21) [2021] ZAWCHC 147; 2022 (1) SACR 325 (WCC) (5 August 2021)

[2021] ZAWCHC 147

COURT

Western Cape High Court, Cape Town

BEFORE

DM Thulare, ED Wille

CASE / FILE NUMBER

274/21

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

HIGH

COURT REF 274/21

In

the matter between:

THE

STATE

V

KERRY N

SANDRA ELGIN

JUDGMENT

DELIVERED ON 05 AUGUST 2021

THULARE AJ (WILLE J, concurring)

- [1] This is a review in terms of section 304(4) of the Criminal Procedure Act, 1977 (Act No.51 of 1977) (the Act). The accused was charged with theft and an admission of guilt fine of R300-00 was set and was paid. This led to a previous conviction being entered on her record. Under a covering letter from the Senior Magistrate in Wynberg Magistrates' Courts, the accused, in an attached affidavit, prays for an order to set aside the conviction and sentence.

[2] On 27 January 2014 the accused entered Clicks at Meadow Ridge Shopping Centre. Upon exiting the store, she was stopped by security

guards and taken to the backroom. The guards, in the presence of some Clicks store staff members, searched her bag and found a mini-hair straightener and a box of Calmettes to the value of R224-90, which the State alleged she had stolen. The police were called and Clicks pressed charges.

[3] She was arrested, escorted to the police vehicle and driven to Diep River South African Police Services (SAPS) station. Four documents attached to the application were prepared at the police station on that day. The first is a J534, which is a written notice to appear in court as envisaged in section 56 of the Act. It is this document that amongst other important entries, indicates that an admission of guilt fine of R300-00 may be paid. The second is an annexure to the written notice which was prepared by a peace officer, AA Bosch, which he signed and the accused also signed.

[4] The annexure has the following typed entry:

“THE STATE VERSUS _____ (Accused).

I, _____ (Peace Officer),

Hereby certify that I personally explained the following to the above mentioned accused.

YOU ARE HEREBY INFORMED AS FOLLOWS:

- Should you pay the admission of fine, you will be deemed to have been convicted and sentenced by the court with jurisdiction in respect of the stipulated offence(s)
- On payment of the above-mentioned admission of guilt fine, such conviction will appear on your criminal record.
- On payment of the above-mentioned admission of guilt fine, you waive the right to-
 - Be sentenced only upon proof beyond reasonable doubt that you are guilty of the commission of the stipulated offence(s);
 - Contest the allegation(s) in open court;
 - Confront your accuser(s);
 - Call witnesses; and
 - Legal representation.

Signature

Designation

Date

I, _____, the above-mentioned accused, hereby confirm that the above-mentioned was explained to me and that I understand the full consequences thereof. I further confirm that I was given the opportunity to decide whether I want to pat the admission of guilt fine or to appear in court to contest the allegation(s) against me and that I freely voluntarily and without undue influence decided to pay the said fine.

Signature

Date

“

The name of the accused, Kerryn Elgin, at the top, that of the peace officer, Arnold Albert Bosch, his signature, his designation as Police and the date of 2014-01-27 are in a handwriting different to the one where the name of the accused, her signature and date later appears. It can be concluded that the earlier part was completed by Bosch and the latter part by the accused.

[5] The third document is the SAPS 14A, which is a notice of rights in terms of the Constitution (Section 35 the Constitution of Act No. 108 of 1996). The relevant parts thereof read as follows:

“(2) As a person who is detained you have the following rights:

- (a) you have the right to consult with a legal practitioner of your choice or, should you so prefer, to apply to the Legal Aid Board to be provided by the State with the services of a legal practitioner;
 - (b) you have the right to challenge the lawfulness of your detention in person before a court of law and to be released if such detention is unlawful;
 - (c) you have the right to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate accommodation, nutrition, reading material and medical treatment at state expense; and
 - (d) you have the right to be given the opportunity to communicate with, and be visited by, tour spouse or partner, next-of-kin, religious counsellor and medical practitioner of your choice.
- (3) As a person arrested for the alleged commission of an offence, you have the following rights:
- (a) you have the right to remain silent and anything you say may be recorded and may be used as evidence against you;

- (b) you are not compelled to make a confession or admission which could be used in evidence against you;
- (c) you have the right to be brought before a court as soon as reasonably possible but not later than 48 hours after your arrest or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
- (d) you have the right, at the first court appearance after your arrest, to be informed of the reason for your continued detention, or to be released; and
- (e) you have the right to be released from detention if the interest of justice permit, subject to reasonable conditions.

You can exercise all the abovementioned rights at any stage during your detention.

CERTIFICATE BY DETAINEE

I, _____ (name of detainee) hereby certify that I have been informed in _____ (state language) of my rights in terms of the Constitution as set out above by _____ (name of person who informed the detainee) and that I understand the contents thereof.

DATE ____ TIME: ____ PLACE ____

(Informed)

(informed)

(informed)

SIGNATURE/THUMBPRINT OF DETAINEE SIGNATURE OF PERSON WHO INFORMED THE DETAINEE"

The names of the accused, the language English, Constable Bawuti and the date 2014-01-27, the time 14:00 and the DIEP RIVER as well as the signature of Constable Bawuti appear in the same handwriting. Signature of detainee appear to be that of the accused.

- [6] The fourth document was a J70(a), an admission of guilt receipt. It was receipt number W5893710. It was issued to the accused in her own name. It was for payment in terms of section 57 of the Act, which was received from her in the amount of R300-00 by the designated official. It amongst others indicates that the date of trial determined was 13 March 2014 and the place of trial was indicated as Wynberg Court. The four documents (the documents) were submitted to the clerk of the court as a result of which a conviction and sentence followed.

- [7] In her affidavit, the accused now alleges that she believed that the SAPS did not follow the correct procedure and that the proceedings against her were not in accordance with justice. She alleged that she suffered from depression and anxiety and used anti-depressant and anti-psychotic medication which had a grave impact on her mental state, making her feel “spaced out” and not herself. She alleged having had an attack whilst in Clicks store which heightened her state of anxiety. When she entered the store according to her, she was ‘in a daze’.
- [8] According to her, at no stage was she advised of her rights to legal representation. She was emotionally fragile and in a very tenuous emotional state after the arrest. She did not understand what was happening and did not understand the steps in the process followed. She was asked if she had cash whilst in transit to the police station, as she would need to pay a fine at the police station. She did not have the cash and was put in the cells at the police station. She could not think clearly and logically. Even at the police station she was never explained her constitutional rights.
- [9] She called her mother, through whom a relative came to the police station and only then was she removed from the holding cells. She was then informed that as the value of the items was quite low, she could pay R300-00 fine, sign a form and they would release her. She was told that if she did not pay, she would be detained overnight for up to 48 hours or until the court hearing. She was terrified and did not want to go back to the cells.
- [10] The option the police gave her was pay a fine or remain in custody. The payment of a fine was presented as the only option for her release. It was never explained that she could be released on warning or on bail and pay a fine later or to appear later in court.. In the absence of an alternative for release, she paid the fine. Documents were presented for her to sign without an opportunity to read them or having them explained to her. She was not given copies of any of the documents. She was just presented with paperwork, told to sign upon which she would be released. It was never explained that the payment of the fine amounted to a permanent criminal record, nor were the repercussions of paying such fine explained. If she had been given an opportunity to present a defence to a court, a court would have found her not guilty.
- [11] Section 304(4) of the Act 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.”

- [12] 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.
- [13] The facts set out in the accused's affidavit now appear after these developments. These new facts were not before the magistrate at the time.
- [14] The procedure as provided in section 57 of the Act differs markedly from the previous procedure provided for in section 351 of the 1955 Act (Act No. 56 of 1955) (the predecessor of the Act). There were seven distinct steps in section 351, which a person, in the position of the accused today, as provided for in section 57, did not necessarily enjoy. The first is the manner the accused was brought before court. The second and the third stood out because they involved the accused person's role, the other three involved the public prosecutor, the clerk of the court and the magistrate's roles and the last one related to the timing of the payment of the fine.
- [15] These seven distinctions are:
- (a) The accused in the section 351 procedure was summoned, warned or arrested by an officer holding a rank or post designated by the Minister.
 - (b) out of own volition the accused signed and delivered a document admitting that they were guilty of the offence and deposited the sum of money or furnished security as the officer deemed sufficient for the payment of any fine which the court might impose [section 351(1) (a) or (b); NGJ Trading Stores (Pty) Ltd v Guerreiro 1974 SA 482 (O) at 484F]. The accused did not pay a fine at that stage.
 - (c) The accused in the section 351 procedure could, at any time before sentence, submit to anyone who was in charge of the documents, an affidavit setting forth facts in mitigation of the sentence, which affidavit would be presented to together with the other documents to the court which considered the papers [section 351(2)].
 - (d) The documents were transmitted from the officer to a public prosecutor for their consideration. After consideration the prosecutor could transmit the documents either to the clerk of the court or the Attorney-General (currently the National Director of Public Prosecutions) for the latter's directions [section 351(3) read with (4). The Attorney- General could direct that no action be taken in the matter or that such person be brought to trial in the ordinary manner. The accused could be summoned or warned afresh to answer the charge [section 351(4) read with (8)].

- (e) It was after the benefit of consideration by a legally trained mind of the public prosecutor, that the clerk could enter the document in the criminal record book whereupon the accused was deemed to have been convicted. The deeming provision was for conviction only, through entry by the clerk of the court [section 351(5)]. After this conviction, through entry, before sentence, the Attorney-General

could direct that no action be taken in the matter but that the person be brought to trial in the ordinary manner [section 351(8)].

The conviction was not a final judicial product.

- (f) It was the magistrate who imposed the sentence [section 351(5); R v Van der Merwe 1958(2) SA 82 (C) at 83A-B]. The magistrate was not bound to impose a fine [section 351(6), (9) and (10)] nor to the amount as deposited or for which security was provided [section 351(7)].
- (g) The fine was paid only after the magistrate had imposed the sentence [section 351(6) read with (7)].

- [16] It is against this background that I understood Holmes JA when he said in NGJ Trading Stores (Pty) Ltd v Guerreiro 1974(4) SA 738 (AD) at 745G-746A:

“Returning to sec. 351, the words “deemed to be convicted” in subsec. (5) seem to me to be appropriate in relation to this procedure designed for the convenience of the accused and the celerity of the administration of justice. First, the accused, having filed a signed admission of guilt and deposited an estimated sum towards a fine, is not required to appear in court. Second, there is no formal plea of guilty in court. Third, he is not present to hear the verdict. Fourth, after the deemed conviction the door is still left open for the court or the Attorney-General to send the case to trial. It is only when the court has finally exercised its judicial discretion in deciding the amount of the fine that the proceedings are complete. By this time there is no question of a statutory deeming. There is a conviction and a sentence. Sentence postulates conviction. This is confirmed by the fact that the accused cannot thereafter be charged for the same offence: the plea of autrefois convict would be available to him. This was pointed out by Klopper, J., in his dissenting judgment in the Court a quo. Moreover, the conviction counts as a previous conviction, as counsel for the respondent rightly conceded.

To sum up so far, it can be said that sec. 351 enacts a machinery partly for the convenience of the accused and that the upshot of it is that he is convicted and sentenced effectively as he would have been of he had appeared in court and pleaded guilty.”

- [17] By contrast, in section 57 proceedings, an accused admitted guilt by paying a fine [section 57(1)(b)]. The section allowed an accused to avoid prosecution by paying a fine. The absence of the role of a public prosecutor at any stage after the amount for the fine has been determined in section 57, is not an oversight, nor is it without significance. There is no prosecution. Hiemstra’s Criminal Procedure, issue I, 8-1 introduced Chapter 8 as follows:

“The aim of this chapter, which comprises only two sections, 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.”

[18] Chapter 8 of the Act’s ideological premise, in my view, is similar to section 387 of Act 56 of 1955 [NGJ Trading, the AD decision *supra* at 744C]. Section 351 made provision for an arrest. Section 387 and 57 made no such provision. Both section 387 and 57 were mechanisms to avoid an arrest and a prosecution. In section 57 the magistrate did not convict or sentence the accused. By the time the matter came before the magistrate, the accused was already, by law, convicted and sentenced [S v Louw 1982 (4) SA 556 (C) at 560H]. One can only set aside a conviction and sentence which had already occurred [section 57(7)].

[19] The magistrate reviewed the conviction and sentence. In S v Marion 1981 (1) SA 1216 (T) at 1218G-1219A the court said:

“In his argument Mr Rossouw laid stress on the fact that, while under s 351(5) of Act 56 of 1955 a magistrate was required to play a specific role in the imposition of the sentence, s 57(7) does not do so. That is correct, but, at the same time, it is important that a new specific function is created by s 57(7), viz that of a limited form of review, involving the making of a decision whether or not to set aside the deemed conviction and sentence.”

In S v Louw, *supra*, the court said at 561C-D:

*“To sum up then, we are of the view that when the documents related to the admission of guilt fine, viz those which are referred to in s 57 and summarized *supra*, are placed before him by the clerk of the court, the judicial officer is required by s 57(7) of the Act to apply his mind thereto and to decide (a) whether the deemed conviction and the deemed sentence should be set aside, with the direction that the accused be prosecuted in the ordinary course, or*

- (b) whether no action need be taken, or (c) in the circumstances to which the proviso relates, as explained above, whether part of the fine imposed should be refunded to the accused and, if he so decides, to so direct.”

The magistrate certified that he or she was satisfied that the conviction and sentence was in accordance with justice [S v Cedras 1992

(2) SACR 530 (C) at 531f-g; S v Tong 2013(1) SACR 346 (WCC) at para 26 and 27].

[20] In this matter, the import of the consequences of the accused paying the admission of guilt fine was not explained to the accused, and this deficiency resulted in the failure of justice [S v Matross 2019 (2) SACR 331 (WCC) at para 7].

[21] The magistrate was not appraised of the facts set out in the accused’s affidavit at the time that the conviction and

sentence were certified to be in accordance with justice [S v Cedras, supra]. Justice requires that the new facts set out by the accused falls to be considered [S v Louw 1982(4) SA 556 (C) at 561E]. Equity and fairness, an alleged erroneous admission of guilt together with and/or a probable or an arguable defence, have been sufficiently demonstrated in the affidavit [S v Parsons 2013(1) SACR 38 (WCC) at para 4].

[22] In S vs Madhinja 2019 (1) SACR 297 (WCC), just like in this matter, the accused was not issued with summons or a written notice in the spirit and purport of section 57. Like low hanging fruits, having committed minor offences, the accused was arrested and detained, contrary to the provisions of section 57. Justice should not be buried in the cemetery of statistics on convictions, for the State to look good on paper, in the battle against crime.

[23] In my view, it would simply be an unnecessary delay to remit this matter back to the magistrate in view of the new facts provided [R v Van der Merwe, supra at 83F-G].

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

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

ED WILLE

JUDGE OF THE HIGH COURT

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