

SOUTH AFRICA / JUDGMENT

S v Houtzamer (B7968969/08)

[2015] ZAWCHC 25 (10 March 2015)

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COURT

Western Cape High Court, Cape Town

BEFORE

Henney, Rogers

CASE / FILE NUMBER

B7968969/08

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THE HIGH COURT OF SOUTH
AFRICA
(WESTERN CAPE DIVISION,
CAPE TOWN)

High Court Ref No: 141171
Magistrate's
Series No: 85/2014

Wynberg Case No: B7968969/08
DATE: 10 MARCH 2015

In the matter between: STATE
And
DANE HOUTZAMER
Coram: HENNEY & ROGERS JJ
Delivered: 10 MARCH 2015

JUDGMENT

ROGERS J (HENNEY J concurring):

- [1] This matter has been referred to this court by the Senior Magistrate of Wynberg with a recommendation that an admission of guilt signed by the accused on 30 June 2008 and the resultant deemed conviction in terms of s 57(6) of Criminal Procedure Act 51 of 1977 be set aside. This follows affidavits made by the accused and his father in August 2014 in which they set out their objections to the admission of guilt and deemed conviction.

- [2] The present case is not one which is required by law to be sent to this court for automatic review. The possibility that the proceedings in the lower court were not in accordance with justice has, however, been ‘brought to the notice’ of this court (cf s 304(4) of the Criminal Procedure Act) by way of the Senior Magistrate’s letter and affidavits mentioned above. Our courts have discouraged the use of s 304(4) as a form of ‘cheap’ appeal or review, because it bypasses the procedures which ordinarily apply to the disposition of such matters. Nevertheless, in the circumstances of this case it would lead to unnecessary wasting of time and cost if we insisted that the accused brought a review application in terms of rule 53.
- [3] The accused, aged 19 at the time, was allegedly found in possession of dagga on 30 June 2008. He was detained by the police. A written notice to appear in court as contemplated in s 56 was issued to him. The notice specified a trial date of 5 August 2008. The notice further informed the accused that he could pay an admission of guilt fine of R200 by 17 July 2008. The money was paid on 30 June 2008 and the accused released.
- [4] According to the affidavit of the accused, he was in the company of a friend when the police stopped them. He says no dagga was found on him. Two rolls of dagga were, however, found on the ground nearby. The police claimed to have seen him throw it there. He remained silent. He was detained and told that R200 would have to be paid to secure his release. He says he thought this was bail money and did not know it was an admission of guilt or would create a criminal record. The accused’s father says in his affidavit that he was informed by the police of the arrest of his son and told he would have to pay R200 to secure his release. He went to the police station and paid the money without talking to his son. When they got home his son told him what had happened. The father says he immediately returned to the police station to query the matter but was told that it had been finalised.
- [5] The s 56 notice did not warn the accused that if he admitted guilt in terms of s 56 he would be deemed to have been convicted and sentenced and would thus get a criminal record.
- [6] On 11 November 2014 I addressed the following query to the magistrate:
- ‘3. The s 56 notice in this case included a statement, signed by a peace officer, D Booysen, that the original was handed to the accused and the importance thereof explained to him (the case is thus distinguishable from *S v Tong* 2013
- (1) SACR 346 (WCC) – see para 13). One only has the version of the accused and his father at this stage to indicate that the import of the notice was not explained. I do not think the cases go as far as saying that, unless the import of an admission of guilt is set out in writing in the notice, the admission is invalid. If that were the position, every admission of guilt utilising the prescribed form as it then existed would be liable to be set aside. Do you say that this is the position? If not, I do not think this court should exercise its power of review before SAPS Grassy Park and the peace officer have been invited to comment on the procedure followed by them in general and in this particular case.

4. The admission of guilt fine was paid on 30 June 2008. The father says in his affidavit that he went back to the police station that night to query the procedure. Yet their affidavits complaining about the admission of guilt were only made in August 2014, nearly six years later. This delay is unexplained. If the admission of guilt were now set aside, the accused could still be tried for possession of dagga but the State might well be hampered in presenting evidence by the accused's lengthy delay in challenging the admission of guilt. The accused should be required to deal with this delay.
5. Although the accused says in his affidavit that he did not know he was admitting guilt, his signature appears under a statement that "I do hereby acknowledge that I am guilty of the offence set out in the summons". The accused has not explained this aspect of his conduct. He should be required to do so.
6. In *S v Cedras* 1992 (2) SACR 530 (C) the court said that one of the matters to be taken into account, when considering the review of an admission of guilt, is whether the accused has an arguable defence if the admission were set aside so that the deemed conviction is probably not in accordance with justice (532a-c). The accused does not in this case say that he was not in possession of the dagga. It was apparently found on the ground nearby. The police claimed that they saw him throw it there. The accused does not say in his affidavit that this is untrue. What he says is that he kept his silence. Again, this is something on which the accused should be invited to elaborate.'

[7] On the same date I directed the following letter to the Director of Public Prosecutions, Western Cape ('the DPP'):

'2. I invite your office's comments on the case. There are three questions in particular on which I would appreciate your input (these are of general relevance to reviews of this kind, where accused persons seek to have deemed convictions arising from admissions of guilt set aside).

3. Firstly, many admissions of guilt and deemed convictions have presumably utilised a s 56 notice in the same form as in the present case. The notice itself does not explain the consequences of signing an admission of guilt but it does make provision for a peace officer to certify that he has explained the import of the document to the accused (though the form in this case spoke of "importance" rather than "import"). Does your office consider that the failure of the notice expressly to set out the consequences of an admission of guilt per se vitiates the deemed conviction or would it depend on what the peace officer actually explained to the accused and the other circumstances under which the accused came to sign the notice? If the propriety of the deemed conviction depends on what the peace officer actually explained to the accused, the court should not in general be acceding to review requests of this kind without input from SAPS.

4. Second, if the review court is satisfied that the accused did not appreciate the consequences of signing the admission of guilt, should the court on that basis alone set aside the deemed conviction or should the court enquire into the merits of the conviction? The Cedras case, mentioned in my query to the magistrate, suggests that a relevant consideration is whether the accused has an arguable defence.
 5. Third, what approach should the court adopt in relation to the delays which often characterise these cases? Sometimes the delay is attributable to the fact that the accused only realises, after the passing of several years, that he has a criminal record. However, the setting aside of the deemed conviction after a number of years (in the present case, more than six) may hamper the State in a subsequent prosecution for the offence.'
- [8] I received the magistrate's reply on 2 February 2015, containing his own remarks as well as input from SAPS Grassy Park and from the accused's father.
- [9] The original J534 form was among the documents included in the magistrate's reply. The front page of the form is the notice to appear in terms of s 56(1). In red print is a note (i) that the accused may admit guilt in respect of the offence by paying the stipulated fine without appearing in court and (ii) explaining how the fine can be paid. On the reverse side of the form provision is made for admission of guilt in terms of s 57. The accused placed his signature on the reverse side under the words (in Afrikaans): 'I do hereby acknowledge that I am guilty of the offence set out in the summons.'
- [10] The Station Commander at Grassy Park says that the form J534 was explained to the accused, that he signed the admission of guilt thereby acknowledging that he was guilty of the offence, that it was explained to the accused that the money was not a form of bail, and that if the accused had thought it was a form of bail he would surely have enquired about the date of appearance. (It does not appear from this response whether the Station Commander discussed the matter with the peace officer who issued the s 56 notice.)
- [11] The accused's father says that his son is suffering from chronic anxiety and that he does not wish to trouble him with questions regarding the incident. The father states that the incident was a frightening experience. On the merits, he says that his son was in possession of the illegal substance but got rid of it before he was arrested – 'He admitted to a past event which was not continuing as in the case of theft'. He proceeds:

'The fact that he got rid of the illegal substance before the arrest was an act of getting rid of the control and ownership of the illegal substance and it remains a question of would he have retaken control and ownership of the substance if he was not arrested? This nobody can answer as nobody can foresee the future, and can only make a conclusion based on the

facts.

I never denied this fact that he was in possession. I questioned the fact that he was arrested without being in possession (control and ownership of the substance) and it was a matter of the time of the arrest. We live in a Western society based on fairness and time is of the essence in our society.'

[12] In his thoughtful response, the magistrate states that in the overwhelming majority of cases of this kind one only has the word of the accused that the import of the notice was not explained to him whereas one has a signed summons indicating otherwise. He says that in all the cases he has handled over the years, accused persons complaining about the deemed conviction say that they were merely ordered to sign the form without being told the reason or consequences. The Wynberg Magistrate's Court has 13 police stations within its area of jurisdiction. There has been an ongoing problem of allegations by accused persons that the police do not properly explain the true effect of paying an admission of guilt fine. The problem persists despite the use of an updated form which incorporates an annexure expressly stating that an admission of guilt entails a conviction and criminal record (the update followed the decision in Tong).

[13] The magistrate then makes the following telling observations (my underlining):

'I have for the period 1/01/2014 until 31/12/2104 received a total of 1413 admission of guilt fines that were issued by the Police. There was not a single case where the admission of guilt fine was paid after the accused was released from custody. They were all paid on the same day and within hours after being arrested. This regardless of the fact that the J534 summons indicates a date by when it should be paid. In the case of Mr Houtzamer, the Honourable Judge will notice that he was arrested on 30 June

2008. The admission of guilt was paid on 30 June 2008 by his father while the accused was still in custody. Yet the form indicates

that he has until 17 July 2008 to pay the fine, either at the Clerk of the Court or at the Police Station. Failure to do so will result in him having to appear in court on 5 August 2008.

Regardless of the picture painted by the paper trail from the Police with regard to the issuing of the summons, it never happens in practice. Accused persons are never released to pay the admission of guilt later. The paying of the admission is being used to finalise the matter. This is a disturbing practice. The majority of petty crime offenders, who are the ones who qualify to pay admission of guilt, are first offenders. People who had never interacted with the police officer before and for whom the experience of being locked up, and even sometimes having to share a cell with hardened criminals, must be a traumatic experience. These individuals and their families will under the circumstances do whatever is necessary to secure the accused person's release. It is this vulnerability that is being exploited in order to finalise matters that sometimes may result in wrongful convictions.'

[14] The magistrate suggests, as a solution, that while the s 56 notice can continue to be issued at the police station, the paying of the admission of guilt fine should no longer be done there but rather at the office of the clerk of the court. The accused, if he wishes to admit guilt, can then attend at some stage after his release at the magistrate's court in order to pay the admission of guilt fine. Having been released from custody, the accused person would typically have about a month in which to obtain legal advice and consider his options. One of these options would be to approach the State to divert the case from the criminal justice system (I assume the magistrate here has in mind an

'early intervention' diversion in accordance with a programme contemplated in s 10(4)(i) of the Prevention of and Treatment for Substance Abuse Act 70 of 2008; and see also s 37 of the said Act read with s 255 of the Criminal Procedure Act). He says most of the offenders in question are young people who do not realise the devastating effect which a criminal conviction will have on their lives. Many of them pay an admission of guilt to hide the incident from their parents.

[15] In regard to Mr Houtzamer's case, the magistrate adheres to his opinion that the admission of guilt should be set aside because the fine was paid by the father without the accused's knowledge and while he was still in custody.

[16] Mr ADR Stephen SC of the DPP's office furnished a helpful memorandum in response to my query, the views in which were endorsed by the DPP. Mr Stephen's comments may be summarised thus:

- (a) The absence, in the s 56 notice, of a detailed description of the explanation given to the accused, is not per se fatal. When a person is arrested (as would occur in a case such as the present involving alleged drug possession), s 35 of the Constitution requires the arresting officer to explain the accused's rights to him or her. This is currently done in writing by way of form SAPS14A. The accused is notified, among other things, of his right to remain silent and his right not to be compelled to make a confession or admission which could be used in evidence against him.
- (b) While it may be correct that the court should be reluctant to grant applications such as the present one without hearing SAPS, there are practical problems. Such applications often arise long after the event, at a time when dockets cannot be found and the memories of police officers have faded. Where the matter is more recent, it might be appropriate for the review court to seek input from SAPS if the circumstances suggest that this would be desirable.
- (c) The review court should not enquire into the merits of the charge. The accused should be entitled to relief if he can establish that he paid the admission of guilt fine in ignorance and wishes to defend himself in court. This flows from the fact that every person has a constitutional right to be presumed innocent until his guilt is proved beyond reasonable doubt.

- (d) Review applications of the present kind are limited to petty offences and are relatively rare. Mr Stephens has not observed a marked increase in such applications, ie he has not detected a trend suggestive of opportunistic reliance on recent judgements as to what police officers should tell the accused in regard to admissions of guilt. The prejudice to the State in trying to reinstitute a prosecution after lengthy delay has to be accepted.
- [17] Even prior to the advent of the Constitution, our courts always insisted that a fair procedure be followed where an accused is invited to consider paying an admission of guilt fine. See, for example, *S v Cedras* 1992 (2) SA 530 (C) and *S v Price* 2001 (1) SACR 110 (C), where the court laid down the following guidelines which a review court will apply in such cases: [a] Are there considerations of equity and fair dealing which compel the court to intervene to prevent a probable failure of justice? [b] The accused must show good cause for mistakenly or erroneously admitting guilt. [c] The accused must show that, were the charge to go to trial, he would have a probable or arguable defence.
- [18] More recently, in *S v Parsons* 2013
- (1) SACR 38 (WCC) and *S v Tong* 2013 (1) SACR (WCC), this court, with particular emphasis on constitutional values, has held that an accused person should be properly warned of the consequences of signing an admission of guilt. See also *S v Claasen* [2012] ZAFSHC 231, *S v Gilgannon* [2013] ZAGPJHC 226, *S v Mutobvu* 2013 (2) SACR 366 (GNP) and *S v Mokwele* [2015] ZAGPPHC 14 where a similar approach was taken in other divisions.
- [19] Following the decision in *Tong*, the J534 now incorporates an annexure, also signed by the accused, expressly warning that if he pays an admission of guilt fine he will be deemed to have been convicted and sentenced and will thus have a criminal record and that by admitting guilt he will be waiving his right to be sentenced only upon proof beyond reasonable doubt in a trial in which he would be entitled to confront his accuser, call witnesses and have legal representation.
- [20] Mr Stephen also annexed to his memorandum a letter addressed on 28 September 2012 by the Provincial Commissioner for SAPS, Western Cape, to all Cluster Commanders, Station Commanders and Provincial Heads in the Western Cape, explaining the import of the *Tong* judgment, stating that SAPS members should ensure that the rights reflected in the new annexure to the J534 were properly explained to the accused and instructing them not to use the payment of an admission of guilt fine ‘as a bargaining instrument to secure a release of an accused from custody’.
- [21] As already noted, the experience of the magistrate in the present case unfortunately suggests that in many instances police station is still not giving effect to the Provincial Commissioner’s letter.

[22] The relevant events in the present case occurred before Tong and the changes implemented as a result of that decision. The affidavits of the accused and his father allege that the true import of the J534 was not explained to the accused. Indeed the latter did not himself pay the fine; his father did. Although the accused placed his signature beneath the acknowledgment of guilt, I would not regard as far-fetched the notion that he did so without reading the form or understanding its contents. The same part

of the document records the receipt number for the fine. In all likelihood the accused was only asked to append his signature once

his father had already paid the sum of R200. The accused may well have regarded his signature as a formality.

[23] Although the Station Commander has stated that the J534 form was properly explained to the accused, it is not apparent whether or not the Station Commander consulted with the peace officer in question before providing the response. One might also think it somewhat unlikely that the peace officer would specifically remember this incident, which occurred more than six years ago.

[24] Furthermore, the Station Commander's response does not specifically state that the accused was told that if he signed the admission of guilt he would be deemed to have been convicted and have a criminal record. The magistrate's recordal of his experience strongly suggests that the true import of admissions of guilt is routinely not properly explained to accused persons.

[25] What I regard as particularly significant is that the admission of guilt fine was paid while the accused was still being held at the police station. He was only released once his father paid the fine. According to the magistrate, this is invariably the practice followed by the police as a means (in the magistrate's opinion) of finalising cases speedily. The police are not entitled to make payment of the fine a condition of the release of the accused person from custody. Section 56(2) specifically states that the effect of a written notice in terms of s 56(1) is that if the accused is in custody he shall be released forthwith. The notice must specify a date on which the accused person shall appear to answer the charge. The notice must also contain the endorsement contemplated in s 57, part of which may include a stipulation of the date by which the admission of guilt fine must be paid to avoid appearance (s 57(2)(a)). If a date by which the fine must be paid is not stipulated, the fine, so it seems, can be paid at any time up to the date of appearance. Indeed, s 57(2)(b) states that an admission of guilt fine may even be accepted by the clerk of the court (though not by the police) after the stipulated date or the date for appearance has expired.

[26] In the present case a s 56(1) notice was issued, from which it follows that the peace officer in question must have believed on reasonable grounds that a magistrate's court convicting the accused would not impose a fine exceeding the prescribed amount. In such circumstances s 56(2) entitles the accused to his immediate release upon the issuing to him of the notice. Even if the accused person is aware of this guilt and believes he will be convicted, there is no

advantage to his signing the admission of guilt and paying the fine forthwith (ie prior to his release), since he will have at least until the date specified in the notice to pay the fine. In the intervening period the accused can, as the magistrate has remarked, consider his options. I cannot believe in the present case that the accused's father would have paid the fine or that the accused would have signed the admission of guilt at the police station if they had been aware that the accused was at liberty to leave and pay the fine at any stage during the period 30 June 2008 to 17 July 2008.

- [27] At the risk of stating the obvious, a peace officer is not entitled to act on the basis that he will only issue a s 56(1) notice if the accused is willing to admit guilt and pay the fine there and then. The use of the word 'may' in s 56(1) ('... such peace officer may ... hand to the accused...') perhaps indicates that a peace officer is not obliged to issue a s 56(1) notice even though he has reasonable grounds for believing that a magistrate's court, on convicting the accused, would not impose a fine exceeding the prescribed amount. (Police Standing Order (G) 341 states that police members should normally refrain from arresting a person if the circumstances specified in s 56(1) are satisfied: see *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC) para 19 note 13.) However, and on the assumption that s 56(1) confers a discretion rather than a power coupled with a duty, the discretion must nonetheless be exercised for a proper purpose. It would not be a proper purpose for the peace officer to base his or her decision to issue the notice on the accused's willingness or otherwise to admit guilt and pay the fine immediately. Such a purpose could never be proper, because the peace officer's objective would be to use the threat of continued custody to put pressure on the accused to admit guilt (cf *Erasmus v MEC for Transport, Eastern Cape* 2011 (2) 367 (ECM) para 22). Furthermore, the said purpose would be at odds with the standard s 56(1) notice which, as in the present case, records that the admission of guilt fine can be paid by a specified future date. It would also be in violation of the Provincial Commissioner's instruction of 28 September 2012.
- [28] In *Cedras* it was said that the accused must demonstrate an arguable defence on the merits of the charge. In the current constitutional regime, however, I do not think this should be regarded as a requirement, at least not invariably. As Mr Stephen has pointed out, an accused, even if he knows he committed the offence, is entitled to require the State to prove its case beyond reasonable doubt. For any number of reasons the State may not be able to adduce sufficient evidence and the accused might thus be entitled to a discharge at the end of the State's case. And as the magistrate has said, the State might be persuaded to drop the charge or (in the case of drug possession) divert the case from the criminal justice system.
- [29] I would simply add, in the present case, that, in the absence of confirmation from the accused himself, the court cannot be certain that what his father says regarding the offence is correct. The father's view is clearly misconceived if he believes that a charge of drug possession could not succeed merely because his son threw the dagga to the ground before the police searched him. However, the court does not know as a certain fact that this is what occurred. Even if it did, the State might have been persuaded not to pursue the charge.

[30] For these reasons I consider that the accused's admission of guilt was not in accordance with justice and should be set aside. It will be for the State to decide whether to proceed with a prosecution.

[31] In my view the magistrate's suggested solution is one which warrants careful consideration by the lawmaker. The problem which has arisen in this and similar cases could be avoided if the accused person were required to be released before signing an admission of guilt and paying the fine. The magistrate's suggestion is that the fine should have to be paid to the clerk of the court and that the police should not be entitled to receive the fine. While this would ensure some separation, in point of time, between release and admission of guilt, it would come with the potential inconvenience to the accused of having to travel

what might be some distance to the office of the clerk of the court. An alternative might thus be to stipulate that an admission of guilt cannot be signed or the fine paid until a specified period has elapsed after the accused's release from custody. This procedure, together with the use of the updated s 56(1) form which properly explains the import of an admission of guilt, should be sufficient to avoid injustice while preserving the convenience to the accused of being able to pay the fine at the nearest police station.

[32] In the meanwhile, the police should not be surprised if the courts look askance, and set aside, admissions of guilt signed and paid while the accused is still in custody.

[33] The following order is made:

[a] The accused's admission of guilt in terms of s 57 of the Criminal Procedure Act 51 of 1977, made on 30 June 2008, is set aside.

[b] The resultant entering in the criminal record book of the particulars contemplated in s 57(6) by the clerk of the court below is set aside and such particulars shall be expunged from the criminal record book.

[c] The clerk of the court shall procure that the fine of R200 paid by the accused on 30 June 2008 is refunded to him within one month of this court's order.

HENNEY J

ROGERS J

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