

SOUTH AFRICA / JUDGMENT

S v Joubert (04/2017, RC150/16) [2018] ZANWHC 3 (8 March 2018)

[2018] ZANWHC 3**COURT**

North West High Court, Mafikeng

BEFORE

J T Djaje, N Gutta

CASE / FILE NUMBER

04/2017, RC150/16

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Reportable:	YES / NO Circulate
to Judges:	YES / NO Circulate
to Magistrates:	YES / NO Circulate to Regional Magistrates: YES / NO IN THE HIGH COURT OF SOUTH AFRICA NORTH WEST DIVISION, MAHIKENG
HIGH COURT REF NO:	04/2017 CASE NO: RC 150/16 In
the matter between:	THE STATE And LYNNETE MAGDALENE MARTHA JOUBERT REVIEW

JUDGMENT

DJAJE J

- [1] This matter was sent on special review on 11 December 2017 by the Attorneys of the accused with the following request:

“1. bring it to the notice of this Honourable Court that the proceedings before Regional Magistrate B M Makabanyane (“the first respondent”) in the Regional Court for the Regional Division of North West held in Lichtenburg in the matter of the State versus Lynette Martha Joubert, case number RC/150/2016 in which a sentence of fifteen

- (15) years’ imprisonment for a conviction of a charge of theft (64) counts brought out against the Applicant by the First Respondent on 6 June 2017 has been imposed on the Applicant by the First Respondent on 27 June 2017 were not in accordance

with justice as contemplated in section 304 (4) of the Criminal Procedure Act, number 51 of 1977 (“the Criminal Procedure

Act”), in that the First Respondent acted irregularly in immediately returning a verdict of guilty without questioning the

Applicant pursuant to the provisions of section 112(1)(b) of the Criminal Procedure Act to satisfy himself that the Applicant is guilty of the crime to which she pleaded guilty and/or enquiring from the Applicant’s legal advisor whether the

Applicant has made a statement as contemplated in section 112 (2) of the Criminal Procedure Act; and

2. apply this Honourable Court to:

2.1 set the conviction and imposed sentence aside on review on the ground that the provisions of section 112 (1) (b) and/or (2) of the Criminal Procedure Act were not complied with by the First Respondent;

2.2 remit the case pursuant to the provisions of section 312 of the Criminal Procedure Act to another Regional Magistrate; and

2.3 direct the latter Regional Magistrate to comply with the provisions of section 112(1)(b) of the Criminal Procedure Act.”

- [2] On 14 December 2017 a query was forwarded for the Attorneys to attach the record of proceedings which was only received on 1 February 2018 by the office of the Registrar of the High Court.

- [3] On receipt of the full record of the proceedings the following query was sent to the Regional Magistrate on 7 February 2018.

“1. This matter was sent on special review by the Attorneys of the Accused that the wrong procedure was followed when the Accused pleaded guilty in the Regional Court.

2. The record of proceedings attached does not indicate if the Accused’s legal representative was given an opportunity to address the court in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977.
 3. The Regional Magistrate is requested to advise.”
- [4] The response from the Regional Magistrate was only received by the Registrar on 2 March 2018 stating as follows:

“Your letter with reference no. 04/2017 dated 07 February 2018 in this regard was never served on me nor did I receive it. I was only provided with the copy thereof by Mr Magabane of MAGABANE ATTORNEYS at Regional Court Lichtenburg in Chambers on 1 March 2018.

The response by the Presiding Officer to the query by the HONOURABLE JUDGE is hereby attached for our attention.

The delay in responding to this query is regrettable. I received this order of the Honourable Judge from Mr. Magabane Attorneys at Lichtenburg Regional Court in Chambers on 1 March 2018.

The Regional Magistrate advises as follows:

1. It is correct that the wrong procedure was followed when the Accused pleaded guilty in the Regional Court. This wrong procedure was a Justus err made by the Presiding Officer. This was an unintentional omission by the Presiding Officer. Even the Accused’s Legal Representative Mr. Magabane regarded this omission as unintentional. During mitigation proceedings he said “The court did not commit this error intentionally, it was just an oversight on the part of the court...”
2. It is correct that the record of the proceedings attached does not indicate if the Accused’s Legal Representative was given an opportunity to address the court in terms of section 112 (2) of the Criminal Procedure Act No. 51 of 1977. This was an unintended oversight by the Presiding Officer. It could be that the Accused’s Legal Representative, a person with blindness or visual disability also omitted to hand a written statement by the Accused into court.

The omission by the Presiding Officer is highly regrettable especially as it is the first time for him to engage a wrong procedure during his judicial career.

If the Honourable Judge directs that the matter be remitted back to the trial court for the correct procedure to be followed, the order will be complied with and the circumstances relevant to the Applicant since then will be considered."

- [5] The accused in this matter appeared in the Regional Court sitting in Lichtenburg and charged as follows:

“Accused is charged with, she is guilty of the crimes of fraud read with section 51 (2) (a) of the Criminal Law Amendment Act 105 of 1997 totalling R596 953, 08, 64 counts.

Alternatively theft also 64 counts also read with section 51 (2) (a) of the Criminal Law Amendment Act, Act 105 of 1997 involving the amount of R596 953, 08.”

[6] She pleaded guilty on the alternative counts of theft. The following appears in the record of proceedings after the accused pleaded guilty:

“15. ACCUSED PLEADS GUILTY

INTERPRETER: You must speak loud and clear madam.

ACCUSED: Okay.

20. MR MAGABANE: Your worship I just want to assist my client your worship. She pleads guilty to the alternative charge your worship. As the court pleases. Of theft

ACCUSED: Of theft.

25. COURT: Accused do you confirm?

ACCUSED: Yes

COURT: So Mr Magabane did you fully explain to the accused the, all the quoted sections of the Criminal Law Amendment Act, Act 105 of 1997 as well as the

5. Criminal Procedure Act as quoted in the section, in the charge sheet?

MR MAGABANE: As the court pleases. Yes, I did so your worship.

COURT: Accused do you confirm?

10. ACCUSED: Yes

COURT: You must speak louder please?

COURT: Ms Prosecutor what do you say with regard to the plea?

15. PROSECUTOR: Your worship it is, I was informed that the accused will plead guilty to the alternative charge of theft on 64 counts on the total amount of R596 953, 08. On that basis I do accept the plea.

JUDGMENT

Ja, the basis has been formed upon which the court is satisfied that the accused admits the elements in the offence unconditionally, here the offence we

5. refer to the alternative count of theft.

And secondly that the accused is guilty to the offence he has pleaded guilty to and as a result the accused is FOUND GUILTY OF THEFT that is the alternative count with the amount of R596 953, 08.”

[7] It is clear from the record of proceedings that immediately after the accused pleaded guilty she was not questioned or a statement read into the record in terms of section 112 (2) of the Criminal Procedure Act. The Regional Magistrate proceeded to convict immediately after the accused pleaded guilty. It was on this basis that the matter has

been sent on special review by the Attorney.

[8] Section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 provides that:

“112.

- (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-
- (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, and may, if satisfied that the accused is guilty of the offence 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.”

[9] Section 112 (2) of the Criminal Procedure Act provides that:

“(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.”

[10] Section 113 of the Criminal Procedure Act provides that:

“113.

- (1) If the court at any stage of the proceedings under section 112
- (1) (a) or (b) or 112
- (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly

admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.

- (2) If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.”
- [11] After pleading guilty to theft the accused was not questioned by the Court nor was a statement in terms of section 112(2) of the Criminal Procedure Act explaining the admission of the elements of the offence handed in by his legal representative. The purpose for giving the accused the opportunity to answer and explain which elements of the offence are admitted is for the court to be satisfied that there is no defence raised by the accused in explaining how the offence was committed. As stated in section 113 of the Criminal Procedure Act if the Court finds that there is a defence raised in the explanation by the accused then a plea of not guilty would be entered.
- [12] The wording of section 112 (1) (b) of the Criminal Procedure Act is peremptory and when an accused pleads guilty the presiding officer should invoke its provisions. Failure to invoke the provisions of section 112 (1) (b) or 112(2) of the Criminal Procedure Act when an accused has pleaded guilty will result in an irregularity as it is not clear whether the accused admits all the elements of the offence or could raise a defence explaining how the offence was committed. It is clear in this matter that the Regional Magistrate has not invoked the provisions of section 112 (1) (b) of 112(2) of the Criminal Procedure Act despite the accused having pleaded guilty. It is my view that failure to do so renders the proceedings to be not in accordance with justice and should be set aside and the matter be referred to another Regional Magistrate to start de novo.

ORDER

[13] Consequently, the following order is made:

1. The proceedings in this matter are not in accordance with justice;
2. The conviction and sentence are set aside;
3. The matter is referred to the Regional Court to start de novo before another Regional Magistrate.

J. T. DJAJE

JUDGE OF THE HIGH COURT

I agree

N. GUTTA

DATE: 08 March 2018

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