

SOUTH AFRICA / JUDGMENT

S v Kholoane (570/2010) [2011] ZAFSHC 213; 2012 (1) SACR 8 (FB) (10 February 2011)

[2011] ZAFSHC 213

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai, Fischer

CASE / FILE NUMBER

570/2010

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FREE STATE HIGH
COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH
AFRICA

Review No. : 570/2010

In the review between:-

THE STATE

and

ITUMELENG PINKI
KHOLOANE

CORAM:

RAMPAI, J et FISCHER,
AJ

JUDGMENT

BY: RAMPAI, J

DELIVERED ON: 10 FEBRUARY 2011

- [1] The matter came by way of a special review in terms of section 304(4) Criminal Procedure Act, No. 51 of 1977. The accused was convicted of four counts of theft. The four counts were all taken together as one offence for the purpose of sentence. The district magistrate then imposed on her a fine of R5 000,00 or 90 (ninety) days imprisonment in default of payment.

- [2] The accused pleaded guilty to all the charges. However, she was not questioned in terms of section 112(1)(b) Criminal Procedure Act, No. 51 of 1977. Instead she was summarily convicted on her plea and then sentenced. The district magistrate's explanation for dispensing with the questioning was that she acted in terms of subsection (1)(a) and not subsection (1)(b) in convicting the accused.
- [3] The distinction between the two legs of section 112 has been discussed and drawn in various decided cases. The first leg, in other words subsection (1)(a), applies to minor crimes, which ordinarily attract relatively lenient sentences. Here the judicial questioning of the accused is not compulsory. However, the sentencing options are limited. The accused cannot be subjected to direct imprisonment. Such a form of punishment is impermissible. That is the first limitation. The detention of the accused has to be coupled with the option of a fine. The maximum fine which can be imposed in terms of the subsection is currently R1 500,00. That is the second limitation. The subsection is sparingly used and only in cases where the court is certain that summarily convicting the accused on his or her bare plea will not cause an injustice – *S v ADDABBA et alii* 1992 (2) SACR 325 (T) at 332 e – f.
- [4] The second leg of the section, in other words subsection (1)(b), applies to serious crimes which ordinarily attract comparatively severe sentences. Here the judicial questioning of the accused is peremptory. A sentence of direct imprisonment without the option of a fine can be imposed. The amount of a fine may exceed R1 500,00. In practice the subsection is frequently used even in cases where the accused persons are charged with trivial crimes.
- [5] The purpose of the subsection is to ensure that the accused really admits all the elements of the crime to which he pleads guilty. The questioning strives to protect the innocent from erroneous convictions based on their own ignorance of the law or improper influence. By compelling the courts to embark on this procedure the underlying idea was that the court should make doubly sure that a person who pleads guilty has indeed no possible defence to the crime he admits committing. In *S v BARON* 1978 (2) SA 510 (C) at 512 G the court held that subsection (1)(b) was designed to protect an accused and especially an uneducated and undefended accused from the adverse consequences of an ill-informed plea of guilty.
- [6] Before the questioning in terms of subsection (1)(b) can be jettisoned; before subsection (1)(a) can be invoked and before an unrepresented accused can be convicted on her unexplained plea of guilty, a court has to form an opinion that the charge concerned is a minor crime; that the accused would have the option of paying a fine to stay out of correctional facility and that such a fine would not exceed the statutory maximum limit. These then are the crucial segments of the jurisdictional fact. The court has to silently consider sentence before convicting the accused. Herein lies the uniqueness of the questionless or passive procedure. Therefore the sentence the court proposes imposing will determine which subsection the court should apply in the case at hand.

- [7] It follows from the foregoing that the court should proceed in terms of subsection (1)(a) to convict the accused only in a case where it intends sentencing the accused in a manner which is squarely compatible with the foundation of its jurisdiction as outlined in the preceding paragraph. Where the court intends imposing a sentence which is incompatible with such foundation, it would be irregular to proceed in terms of subsection (1)(a).
- [8] The request of the district magistrate, in this instance, is that the conviction be confirmed on special review and that only the sentence should be rescinded. The district magistrate was of the view that the accused had suffered no real prejudice because the excessive fine was easily and immediately paid for her release. The learned district magistrate obviously takes a narrow view of the problem. The problem is bigger than she reckons. It is not a simple matter of correcting the sentence only by downward adjustment of the excessive fine imposed on the accused. The issue is more complex than that. It fundamentally affects the very foundation of the verdict. It is the lawfulness of the conviction and not so much the unlawfulness of the sentence which is in issue here. The sentence flows from the conviction. Because it does, it would be wrong to simply adjust the sentence *ex post facto* without enquiring into the lawfulness of the conviction from which the sentence stemmed - *S v ADDABBA*; *S v NGEME*; *S v VAN WYK* 1992 (2) SACR 325 (T) at 330 a – b.
- [9] Apparently the district magistrate did not know the statutory limit of a fine to be imposed in terms of subsection (1)(a). I hasten to say it is not something to be ashamed of for even the best of the jurists do not know all there is to know about law. Law is an immensely vast and intricate vocation. This is certainly not the case of a magistrate who knew the limit but merely forgot to act in accordance with her knowledge on account of an inadvertent error. It is unlikely that she fell in that category. This is so because besides this particular case, she made similar mistakes in connection with three other cases. The excessive fine imposed, not once but four times, tended to demonstrate that she did not actually form the requisite opinion that she would impose on the accused a sentence consisting of a fixed term of detention coupled with an inexcessive fine, which fine would not exceed the prescribed maximum limit. The formation of a judicial opinion that the sentence would not exceed the limit applicable to the fine, is one of the defining cornerstones for the invocation of subsection (1)(a). Since this dimension of the jurisdictional fact
- was missing, the district magistrate could not have properly acted in terms of subsection (1)(a) as she purported to do.
- [10] There is a fixed cut-off point of R1 500,00 between subsection (1)(a) procedure where conviction, without judicial questioning, can properly follow a bare plea and subsection (1)(b) procedure, where conviction without judicial questioning, cannot properly follow a bare plea. Where a magistrate is of the opinion that a fine, in excess of R1 500,00 limit, is justified, she or he is incompetent to find an accused guilty on the strength of an accused's mere plea.

- [11] The excessive fine is not the only ground in this review on which the conviction can be challenged. The district magistrate reckoned that the strongly aggravating factor against the accused, besides the number of her acts of stealing, committed in four different stores in Bloemfontein on 6 October 2010, was that she was a member of an organised criminal syndicate from Lesotho, which specialised in shoplifting and that the accused had entered this country for the sole purpose of furthering that objective. I do not know what the exact source of such material was, because the accused was not questioned and no witness was called to give any evidence before the verdict was announced. However, that is not where I am getting at.
- [12] The point I want to make is this: If the accused was indeed shown to be a member of such a foreign syndicate, then the charges were not trivial, but very serious matters. That the magistrate herself regarded the case as a very serious one, is further demonstrated by the huge amount of the fine imposed. The actual fine is more than threefold the prescribed maximum amount. Seeing that the district magistrate saw the case in such a serious light, she should have used subsection (1)(b) and not subsection (1)(a). The former was precisely designed to deal with cases where the accused pleads guilty to serious crimes. By applying the latter, the district magistrate erred.
- [13] Although the district magistrate appreciated the gravity of the crimes, she nonetheless used a procedure exclusively created for minor crimes. The conviction of the accused without questioning in terms of subsection (1)(b) was so procedurally irregular it cannot be redeemed in any way least by simply taking any corrective intervention which is restricted to the sentence only - *S v ADDABBA*; *S v NGEME*; *S v VAN WYK* 1992 (2) SACR 325 (T). In my view her failure to appreciate the fundamental distinction between the procedure in terms of subsection (1)(a) and the procedure in terms of subsection (1)(b) constituted a specially reviewable misdirection. In the circumstances I am disposed to annulling both the conviction and the sentence.
- [14] The excessive fine was R3 500,00 more than the cut-off limit between the two procedures. Therefore the discrepancy was enormous. But the prejudice in this case went beyond the financial consideration. It cannot be redressed by simply refunding the excess to the accused. The court below did virtually nothing to ascertain whether the accused was improperly induced or not to plead guilty. Instead of questioning the accused in order to eradicate possibilities inconsistent with her plead and to pronounce an informed verdict, the court merely inferred thieving from mere possession. A possessor of stolen goods is not always necessarily the original thief. In certain circumstances such a possessor might even have carried the stolen goods without any involvement in their actual stealing and without any knowledge that they were stolen.
- [15] It has been held that where a court deals with an undefended and unsophisticated accused and proposes to impose a sentence substantially in excess of the statutory limit as laid down in subsection (1)(a), it remains not only desirable but essential as well, for the sake of fair administration of justice, that the court nevertheless questions the accused as if subsection

(1)(b) applies - S v ADDABBA et al, supra, at 332 b – d. In my view, the configuration of the two procedures is undesirable. The important distinction between the two may thereby be blurred. If subsection (1)(a) is not strictly complied with sentence-wise, then subsection (1)(b) should not be used as a corrective procedure for a sentence which does not fully fall within the scope of subsection (1)(a).

[16] The court has to decide whether to use subsection (1)(a) or subsection (1)(b). There is no via media somewhere between the two for a hybrid procedure. I venture to say that the court which applies subsection (1)(a) should only import the tool of judicial questioning into the subsection provided the fine component of the sentence it proposes imposing, does not exceed the statutory limit. In other words, if the matter falls squarely within the ambit of subsection (1)(a) the court

is at liberty to pose certain judicial questions to the accused for the purpose already stated elsewhere. Conversely, if the proposed

fine exceeds such limit, however marginal the excess may be, then, the court should rather completely deal with the matter in terms of subsection (1)(b) instead of using subsection (1)(b) to perfect irregular use of subsection (1)(a) procedure. In that way there will be no undesirable grey areas created.

[17] The way the court below went about lacked procedural fairness and indeed substantive fairness. These are the two hallmarks of justice. In the circumstances it cannot be said that the guilt of the accused in this case was established beyond reasonable doubt by means of her dry and bare plea.

[18] Accordingly I make the following order:

18.1 The conviction and sentence are set aside.

18.2 The plea of guilty as originally tended by the accused stands.

18.3 The case is remitted to the district court.

18.4 The district magistrate concerned is directed to proceed further in terms of section 112(1)(b) Criminal Procedure Act, No. 51 of 1977.

M.H. RAMPAL, J

I concur.

P.U. FISCHER, AJ

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