

SOUTH AFRICA / JUDGMENT

## S v Majola (R60/2021; C1181/2021) [2021] ZAMPMHC 36 (24 December 2021)

[2021] ZAMPMHC 36

COURT

Middelburg High Court, Mpumalanga

BEFORE

Ratshibvumo, Vukeya

CASE / FILE NUMBER

R60/2021; C1181/2021

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THE

HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG LOCAL SEAT

HIGH

COURT REF NO: R60/2021

MAGISTRATE

CASE NO. C1181/2021

MAGISTRATE

SERIAL NO. 03/2021

In

the matter between:

THE

STATE

And

BHUTI

MAJOLA

REVIEW

**JUDGMENT**

RATSHIBVUMO J

**Introduction.**

[1] This matter was laid before me as a review case in terms of section 302 of Act 51 of 1977 (the Criminal Procedure Act) from the District of Witbank. The accused was charged for theft of four chocolates

valued at R72.45. The crime was alleged to have taken place on 29 July 2021 at the Witbank Spar Supermarket. He has been in custody

since then. He was convicted following a guilty plea and sentenced on 20 August 2021 to 24 (twenty-four) months imprisonment.

[2] Upon perusal of the trial record, it was conspicuously incomplete in that it was only the sentencing part without the plea and judgment. It took another month for the trial Magistrate to avail the complete

trial record at my request. It appears she was unaware that she had sent an incomplete record until she was alerted to it by that

request. Once a complete record was made available, I immediately requested the office of the Director of Public Prosecutions (the DPP) to comment on the sentence imposed. Office of the DPP responded within 24 hours. The court is indebted to Senior Advocate Smith and the DPP, Advocate Mpolweni who gave this matter the necessary urgency with a view that if possible, the accused may spend Christmas with his family.

Questions in terms of section 112(1)(b) of the Criminal Procedure Act.

[3] Before dealing with the sentence, I am obliged to make a remark on the questions posed by the magistrate in terms of section 112(1)(b) of Act 51 of 1977 (the Criminal Procedure Act). The accused was

unrepresented and indicated he wanted to plead guilty to the charge. The questions and answers that led to the conviction of the accused are brief:

COURT: Thank you. Are you in your sober senses Sir?

ACCUSED: Yes.

COURT: Are you pleading guilty out of your own accord, there is no one who influenced you?

ACCUSED: Yes your worship. It is out of my free will that I am pleading guilty.

COURT: Thank you Sir. On the 29th of July 2021 were you at Spar?

ACCUSED: That is correct.

COURT: It is alleged you stole 6 chocolates at the value of R72.45. Do you know that?

CPURT: The chocolates belong to Spar?

COURT: You knew that your actions were wrongful on the time of committing that offence?

COURT: Did you know that this action which, the offence which you have committed is punishable by law?

ACCUSED: Yes I knew your worship.

After this response, the court proceeded to pass a judgment in which it convicted the accused.

[4] In *S v Nyanga*[1], Moosa J observed,

*“Section 112(1)(b) questioning has a twofold purpose: firstly, to establish the factual basis for the plea of guilty and, secondly, to establish the*

legal basis for such plea. In the first phase of the enquiry, the admissions made may not be added to by other means such as a process of inferential reasoning (*S v Nkosi* 1986 (2) SA 261 (T) at 263H–I; *S v Mathe* 1981 (3) SA 664 (NC) at 669E–G; *S v Jacobs* (supra at 1117B)). The second phase of the enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence have been met. They are the questions of unlawfulness, actus reus and mens rea. These are conclusions of law. If the court is satisfied that the admissions adequately cover all these elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty. (See *S v Lebokeng en ’n ander* 1978 (2) SA 674 (O) at 675G–H; *S v Hendricks* (supra at 187b–e); *S v De Klerk* 1992 (1) SACR 181 (W) at 183a b; *S v Diniso* 1999 (1) SACR 532 (C) at 533g–h.)”

[5] Questions that amount to a mere regurgitation of what appears in the charge sheet are insufficient as they do not give a factual matrix in support of a guilty plea.[2] Admissions to legal statements by an unrepresented accused are of no value. The judicial officer should ask questions that invite the accused to give facts upon which he/she can make legal conclusions therefrom. A good example is a case where an accused faces a charge of failure to pay maintenance as ordered by court. It adds no value to ask the accused if he admits that he had no right to disobey a court order.[3] As Comrie J observed, asking such a question amounted to asking the accused to pass judgment on himself.[4] That is the very thing which s 112(1)(b) is designed to avoid. The Magistrate should have asked the accused why the accused fell into arrears and, depending on his answers, should have asked further questions . . . as were necessary to obtain the relevant

facts.

- [6] The facts the Magistrate needed were to establish if the accused acted as alleged in the charge sheet, whether such conduct does not exclude unlawfulness (grounds of justification) and whether he acted with the necessary intention to permanently deprive the owner of his or her ownership. Had the Magistrate asked a simple question on what happened, the accused would have given facts on which all the questions above would be covered. If some questions would not be covered, she would have an option to ask follow up questions. This approach is endorsed by the DPP who made a submission quoting with approval the words by Broome J in *S v Mkhize*[5] saying,

*“In my view accused persons in proceedings such as this should be invited to explain what happened. An accused should be encouraged to tell his story. Where possible questions from the Bench should be as few as possible, and preferably only those necessary (a) to elucidate what the accused has volunteered and (b) to canvass any allegations in the charge not mentioned by the accused and, of course, (c) to confine the accused to the relevant detail.”*

- [7] This court will however not interfere with the conviction because the facts which should have come up during the questioning in terms of this section, still came out during mitigation for sentence when the accused told the court why he stole the chocolates and where he found them in the shop.

The Sentence.

- [8] The Magistrate was not asked to give reasons for the sentence. I however agree with the submissions made by the DPP that any further delay in dealing with this matter will result in undue injustice as

the sentence imposed has to be set aside immediately as it induces shock and is not in accordance with justice. The sentence is clearly disproportionate to the legitimate needs of the society, the offender and the crime committed. The court a quo seemed to have overemphasised the weight to be attached to the previous convictions that the accused had forgetting that he was punished for each one of them and paid for his wrongs.

- [9] The accused had six previous convictions of theft. These exclude the convictions older than 10 years as they cannot be taken into consideration for purposes of sentence.[6] Three of these were committed in 2015 and the sentenced as follows: In the first one, he was sentenced to a fine of R2000.00 or six months’ imprisonment which was wholly suspended conditionally. On the second one he was sentenced to a fine of R500.00 or 30 days’ imprisonment. On the third conviction, he was sentenced to a fine of R5000.00 or 90 days’ imprisonment. The other two convictions were in 2016 wherein he was sentenced to a fine of R500.00 or 25 days’ imprisonment in one, while he was sentenced to three years’ imprisonment in another. The last conviction was in 2020 and earned him six months’ direct imprisonment. It is therefore unclear as to what the Magistrate meant when in imposing the sentence, she said, “the punishment that the court is going to impose is the punishment that

has not been used on your other punishment... It is a punishment that will rehabilitate you.” It is however clear that the accused was punished heavily because of his previous convictions.

- [10] As this court emphasised in *S v Osmond*[7], previous convictions play a role of stripping the offender of all the privileges he would otherwise enjoy if he was a first offender. They however should not subject the offender to double jeopardy as he/she has already received due punishment for those previous convictions. In *S v Baartman*,[8] the following was held regarding the value of previous convictions when imposing a sentence,

*“In a case such as this it is necessary to be aware of three considerations:*

- (a) the accused should be sentenced for the offence charged and not for his previous record;
- (b) the public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence; and
- (c) while it may be justifiable up to a point to impose escalating sentences on offenders who keep on repeating the same offence, there are boundaries to the extent to which sentences for petty crimes can be increased... It all comes down to the basic principle that the punishment should fit the crime.”

- [11] The court is inclined to agree with the submissions by the DPP who quoted with approval a paragraph from *S v Thonga*[9] to the effect that,

*“[D]uring the imposition of punishment, the trial court jealously guards the fine line between raw revenge or emotional punishment and the judicial, reasonable and objectively balanced (effective) exercise of its penal discretion. Judicial aloofness, not amounting to judicial remoteness, is called for. Seeking to prevent the need (or desire) for self-help from arising, courts of law simultaneously refuse to take emotional revenge on behalf of indignant society and its members.”*

- [12] The DPP submitted in their well-reasoned and researched submissions that in light of the fact that very little was known from the facts that came up during the questioning of the accused in terms of section 112(1)(b) of the Criminal Procedure Act and during mitigation for the sentence, there is no further information available other than that he stole four chocolates. There is nothing from the facts that aggravates or even mitigates in favour of the accused. The DPP requested that a wholly suspended sentence be imposed. For a person who has been in custody for the past six months, I agree that a suspended sentence would be in accordance with justice.

- [13] In light of the above, the following order is made

[13.1] The conviction of the accused is hereby confirmed.

[13.2] The sentence imposed on the accused is hereby set aside and replaced with the following:

[13.2.1] The accused is sentenced to 12 (twelve) months' imprisonment, which is wholly suspended on condition that the accused is not again convicted of theft for which a sentence of imprisonment without an option of a fine is imposed, committed during the period of suspension.

[13.2.2] No order is made in terms of section 103, Act 60 of 2000. (Accused is automatically declared unfit to possess a firearm).

T.V. RATSHIBVUMO

JUDGE OF THE HIGH COURT

I agree and it is so ordered.

L VUKEYA

Date: 24 December 2021

[1] 2004

(1) SACR 198 (C) 201B-E

[2] S v B 1991 (1) SACR 405 (N) 405H

[3] See S v Papers 2019

(2) SACR 638 (NCK) and S v Diniso 1999 (1) SACR 532 (C)

[4] S v Diniso (supra) at 533H.

[5] 1981(3) SA 585 (N).

[6] Nthabalala v S (829/13)

[2014] ZASCA 28 (28 March 2014)

[7] 2020

(1) SACR 357 (ML) at para 6.

[8] 1997

(1) SACR 304 (E) at paragraph 305B-C.

[9] 1993 (1) SACR 365 (V) at para 370H-I

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