

SOUTH AFRICA / JUDGMENT

S v Makhubu (R41/2020)

[2020] ZAFSHC 96 (8 May 2020)

[2020] ZAFSHC 96**COURT**

Free State High Court, Bloemfontein

BEFORE

N.M. MBHELE, P.E. MOLITSOANE

CASE / FILE NUMBER

R41/2020

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Review****No: R41/2020****THE****STATE****and****DAVID****OUPA MAKHUBU****CORAM:**

MBHELE, ADJP et MOLITSOANE,J

JUDGEMENT**BY: MBHELE, ADJP****DELIVERED ON: 8 MAY 2020**

- [1] This matter came before us in terms of s116 (3) of the Criminal Procedure Act 51 of 1977. The accused was charged with one count of theft. On 8 October 2019 he was convicted as charged. Owing to his multiple related previous convictions, the presiding magistrate referred the matter to the regional court for sentencing. The record submitted to the regional magistrate was incomplete and as a result the Regional Magistrate raised a query with the presiding magistrate.

[2] The presiding magistrate reconstructed the record and sent the following response to the Regional Magistrate.

1. Introduction

I firstly want to apologise for the incomplete record of the proceedings that was forwarded to you.

Unfortunately the court recording was forwarded to you by the relief prosecutor before forwarding it to me to see if everything was in order. I previously had that arrangement with my permanent prosecutor.

After receiving your query dated 04/12/2019 I perused the transcripts of the case and saw that there were transcripts of proceedings in this case that was not forwarded to you. I have now taken it up with the clerk of the court to enable me to forward all the transcripts of the proceedings.

Unfortunately I found that the proceedings as held on 20/05/2019 and 21/05/2019 were not transcribed and had to be reconstructed. Apart of the proceedings that dealt with on 13/09/2019 namely the accused's plea was also not transcribed and had to be reconstructed. It is in the light of the transcribed record and reconstructed records of the proceedings that I will now deal with your queries raised. I will deal with your queries as numbered under paragraph 2 of your letter.

2(a) From the record of the proceedings dated 23/04/2019 the accused's rights to legal representation was explained to him on first appearance, he then decided to apply for legal aid and Mr T Mofokeng from the legal aid board was then appointed on his behalf. But on the 31/07/2019 when the case was set down for plea and trial, the accused was not at court and a warrant of arrest was issued and Mr Mofokeng cancelled his mandate to appear for the accused.

The accused was then arrested and brought before the court on 13/09/2019. On 13/09/2019 the accused's rights to legal representation was then again explained to him. He was then adamant that he wanted to conduct his own defence. The court encouraged him to appoint an attorney and if he could not afford an attorney to apply for legal aid. The accused was still adamant that he wanted to conduct his own defence and that he wanted the matter to be finalized. The court then proceeded with the accused's plea and his enquiry whilst the accused conducted his own defence.

2(b) Regarding the enquiry that was held on the 13th September 2019 the record of the proceedings with regard to the enquiry is now attached, see the record of the proceedings of the 13th September

2019. Because of the transcribed record now attached the queries regarding points 2(c) and 2(d) are therefore also answered.

2(e) With regard to my sentence for the accused to appear in court, the court made use of the provisions of the Adjustment of fines Act. Act 101 of 1991. If the Adjustment of fines Act is used, a maximum fine of R5000 or 3 months imprisonment can be imposed. This is far more realistic maximum sentence for offenders who have a wilful disregard to appear in court.

It is further my respectful submission that the fine of R2000 is not excessive taking into account (as the court found) that the accused deliberately failed to attend court. Furthermore, that a warrant of arrest was issued for his arrest on 31/07/2019, and that he was only arrested by the police on 13/09/2019 about a month and a half later. Those are the main reasons for adjustment of the fine.

2(f) The transcribed record for the previous appearances are now attached.

2(g) The transcribed court records and restructured records have now been attached pertaining to the constitutional rights and procedural rights that were explained to the accused before the trial commenced.

2(h) Because the whole transcribed record of the proceedings were not attached and only that of the 8th of October 2019 I can understand the problem the reviewing acting Regional magistrate was facing because of certain very important parts of the trial case not being transcribed and attached. I am referring to the plea proceedings of the accused and allegations he admitted during his plea of guilty until his plea was changed to not guilty.

The allegations admitted by the accused during his plea were the following namely:

1. That on 19/04/2019 in Vrede in the district of Vrede he was found in possession of a DVD player.
2. That he saw the DVD player was a new DVD player and that he can't dispute that the value thereof was R400.
3. He further did not dispute that the DVD player was the property or in lawful possession of Adrian Azaz.

The accused further stated before his plea was changed to not guilty, that he received the DVD Player from one Jabulani at the Indian shop and that after he was found in possession of the DVD player by the security guard he was taken back to the Indian shop where they found the owner of the store. The owner of the store then confirmed that he was the owner of the DVD player. The owner then opened a charge.

After the accused's plea of guilty was changed to one of not guilty the court explained to him that all allegations made by him before his plea was changed to not guilty shall stand as proof of such allegations. The court further explained to him that it would not be necessary for the state to lead evidence regarding those allegations. The accused stated that he understood.

With reference to the query: if one looks at the allegation confirmed by the accused during his plea of guilty that on 19/04/2019 in Vrede in the district of Vrede he was found in possession of a DVD player and after being informed by the court after his plea was changed to one of not guilty that this allegation will stand as proof of such allegation and that it would not be necessary for the state to prove the allegations. It therefore follows that the identity of the accused was no longer in dispute as he admitted being in possession of the said DVD player. The court also accepted his evidence as a single witness based on the reasons mentioned in my judgment.

2(i) It is my respectful submission that the accused was alerted to the nature and dangers of the evidence as reflected in the court record attached.

2(j) As discussed under paragraph 2(h) of which the record was only later reconstructed the accused pleaded guilty and admitted during his plea of guilty that he was found in possession of a DVD player he further did not dispute the value thereof being R400. He stated it was a new DVD player. He further did not dispute during his plea that the DVD player was the property of Adnan Ajaz. In his plea explanation he informed the court that DVD player was given to him just outside the Indian shop by one Jabulani. He further stated that he (the accused) was found in possession of the DVD player and thereafter taken back to the shop where the shop owner identified the DVD player and laid a charge.

It therefore follows that it was not necessary for the state to call Mr Adnan Ajaz to identify or describe or describe the alleged stolen property as these allegations were admitted by the accused during his plea of guilty, before his plea was changed to one of not guilty.

Except for the above mentioned the state is dominus litis and must decide who they are going to call or not to prove their case. They decided not to call Mr Adnan Ajaz and that is their prerogative.

The court also did not ask the state in their address before judgment why the witness was not called, because the court also felt it not to be necessary because of the allegations admitted by the accused during the plea.

[3] The regional Magistrate thereafter referred the matter to this court with the following note:

“Despite the district magistrate’s response and views, I am still in doubt whether the said proceedings were in accordance with justice for, over and above the reasons raised in the query addressed to the district magistrate; the following further reasons:

- a. The attached record of the 13th September 2019 starts off at 12:06 with the Magistrate’s explanation of competent verdicts to the accused. The record does not reflect that the charge was put to the accused nor that he plead to same.
- b. It continues from pages 40 to 50 of the paginated record bundle without an indication that the trial was proceeded with. It is apparent from the record that the learned district magistrate proceeded with an inquiry for the accused failure to appear and finalised same, where after the case was postponed to the 16th September 2019.

- c. On the 16th September 2019 the matter was postponed to the 27th September 2019. It is worth noting that on page 54 of the paginated record bundle at paragraph 5, the learned district magistrate notes that the accused pleaded and gave a plea explanation. On page 43 of the paginated record bundle the district magistrate noted at paragraph 10 that the accused “has now not pleaded guilty”. It is thus not clear the grounds on which the district magistrate indicates the accused pleaded guilty (See: page 60 paragraph 10-15 of the paginated record bundle; see also page 9 of the paginated record bundle – J15)
- d. On page 107 at paragraph 5 of the paginated record bundle during the record reconstruction proceedings the accused disputed on record that he pleaded guilty to the charge.”
- [4] I have considered the concerns by the regional magistrate, the presiding magistrate’s response and the record of the proceedings. Upon perusal of the transcribed record as well as the reconstructed record, it became apparent that during the record reconstruction proceedings the prosecutor, interpreter as well as the accused confirmed that the charge was put to the accused. The accused further confirmed that he did tender a plea although he insists it was a plea of not guilty. He confirmed that it is at that stage of the proceedings when he gave an explanation of how the dvd player came into his possession. From the record it is clear that the accused confirms that he was asked to plead, what he disputes is the kind of plea recorded on the J15.

- [5] The J15 reflects the following on the section dealing with plea:

“Plea on 13/09/2019: Guilty

On 13/ 09/ 2019 ito sect 113 (1) of the CPA plea changed to one of not guilty”

- [6] The reconstructed record confirms that the presiding magistrate invoked the provisions of section 113 (1) of the Criminal Procedure

Act 51 of 1977 (the Act) after the accused tendered a plea of guilty and gave an explanation that raised a defence. The record

reflects, further, that the accused’s rights in terms of section 112(1) (b) were explained to the accused. It

follows that the only way the presiding magistrate could have invoked the provisions of section 113 of the Act is if the accused had tendered a plea of guilty.

- [7] Whether the accused tendered a plea of guilty or not is immaterial owing to the fact that the matter proceeded as though the accused pleaded not guilty. I cannot find that the accused suffered any prejudice.
- [8] I am unable to find fault in the manner in which the proceedings were conducted. I am satisfied that the proceedings were in accordance with justice and that the conviction ought to stand. The matter ought to be remitted to the Regional Court for sentencing proceedings to ensue.

Order:

1. The conviction is upheld
2. The matter is remitted to the Regional court for sentencing proceedings to ensue.

N.M. MBHELE, ADJP

I concur.

P.E. MOLITSOANE, J

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