

SOUTH AFRICA / JUDGMENT

S v Marotholi (R47/2020) [2020] ZAFSHC 107 (18 June 2020)

[2020] ZAFSHC 107

COURT

Free State High Court, Bloemfontein

BEFORE

Majosi, Reinders

CASE / FILE NUMBER

R47/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Review

no: R 47/2020

Magistrate

court no: A 1480/19

In

the matter between:

THE
STATE
and
ISHMAEL MAROTHOLI

CORAM:

REINDERS,
J et, MAJOSI, AJ

JUDGMENT

BY: MAJOSI, AJ

DELIVERED ON: 18 JUNE 2020

- [1] This matter comes before us as an automatic review in terms of Section 302 (1) of the Criminal Procedure Act 51 of 1977 (the CPA). The unrepresented accused was charged with theft subsequently convicted despite his plea of not guilty and sentenced to 18 months imprisonment. In terms of Section 103 (1) of the Firearm's Control Act 60 of 2000, the accused was declared unfit to possess a firearm.
- [2] Upon perusal of the trial record and the attached charge sheet, it appeared that rights to legal representation and competent verdicts were not explained on the date of trial and were last explained on the accused first appearance some four months prior to the trial and the accused subsequent conviction. I caused a query to be sent to the Magistrate to clarify these aspects and also to explain the delay in having the matter remitted for review.
- [3] The Magistrate's response was received and he explained that the delay was attributed to transcription of the record and postal services as the Post Office was under lockdown and the review was retrieved and then hand delivered to the High Court by an official from the Welkom office. The explanation is amendable in light of the COVID 19 pandemic Regulations.
- [4] The Magistrate had the following response to my query and it is extracted from the relevant sections of his two page letter:

"... On 04/03/2020 the record shows that his rights in respect of Legal Representation were not repeated. The practice followed by the court is to inform and encourage the Accused to appoint a Legal Representative, either one in private practice or Legal Aid. The only explanation I can give is that the stenographer failed to record the initial stage of the proceedings. It was an oversight on my part."

"It is correct that the court failed to explain the competent verdicts of Theft to the Accused. The Court refers to S v MTHIMKULU 1959(4) SA 597(O) at 598D, the Prosecutor should play an active role and timeously request the court to do so. There is case law to indicate that even if the rights in respect of Competent Verdicts are not explained it is not futile if the accused is found guilty of lesser offence. S v MAGANDI 1961(4) SA 112(T) S v MWALI 1992 (2) SACR 281 (A). The test will be if there has been any prejudice to the Accused. In this case the competent verdicts played no role as he was found guilty of Theft."

- [5] Section 35 (3) of the Constitution provides that every accused has the right to a fair trial which includes the right to a legal

practitioner assigned to his case and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.[1] In S v Ramulifho 2013(1) SACR 388 SCA the Supreme Court of Appeal reiterated this section and went on to state that Magistrates are obliged to assist the accused person to present his case properly so that a fair trial ensues. This includes assisting the accused at all stages of the trial about his basic procedural rights – right to cross examine, the right to testify, the right to call witnesses the right to address the court on both the merits and in respect of a sentence and in plain language the significance and purpose of these rights. In other words, the Magistrate is duty bound at every stage of the proceedings to render

assistance to the accused in presentation of his case and if necessary, intervene to ensure fairness and justice.

- [6] The Magistrate in his response (as indicated in para [4] herein above) conceded that the accused's right to legal representation was not repeated and it was an oversight on his part. This oversight ought not to be repeated. It is so that the accused suffered no prejudice from competent verdicts not being explained as he was convicted of theft. In my view, this responsibility however cannot be delegated to a prosecutor to remind a trial court about competent verdicts contained in the CPA.
- [7] The relevant question to pose here is found in *S v May* 2005 (2) SACR 331(SCA) where it was asked "whether or not prejudice has resulted from the lack of legal representation is really a question that can be determined only by having regard to the whole trial, and the way in which it was conducted by the judicial officer; and the ability, as shown during the course of the trial, of the accused to represent himself adequately; and to whether the evidence adduced has led justifiably to the conviction and sentence." More pertinently, did the lack of legal representation result in an unfair trial and a failure of justice?[2]
- [8] The prosecution led the evidence of two witnesses after a plea of not guilty by the accused namely the complainant Mr Rankoe and an eye witness, Ms Ntswale, for the theft of a cellphone valued at R 6000.00. The complainant, just after 9h00 on the morning of the 2nd of November 2019 as confirmed by an eye witness, testified that when his phone was stolen from his trouser pocket, he was fast asleep after having consumed alcoholic beverages. Ms Ntswale, who knew both the complainant and the accused, would have witnessed these events just after 9am in the morning in broad daylight and whilst in her sober senses.
- [9] The accused testified in his defence denying all allegations against him but conceded that he was indeed in the tavern on the said day, at the relevant time and that the complainant and Ms Ntswale was present though not seated together. The accused's girlfriend also testified but could not take the accused's or the state's case for that matter any further as at all times she was standing outside the tavern and did not observe anything related to the incident inside the tavern.
- [10] In my view, the court correctly convicted the accused of theft as the evidence of both witnesses were found to be reliable and credible and rejected the accused's version as false after weighing up the conspectus of the evidence. The Magistrate's reasons for conviction cannot be faulted. At all relevant stages, the Magistrate also explained trial rights and the effect of the accused's possible choices.
- [11] Sentencing rights were also sufficiently explained to the accused as he himself and his girlfriend testified in mitigation of sentence. It is evident from the record that the accused wanted a non - custodial sentence to be imposed due to him supporting three dependants, of whom one is a minor child. The record however reveals that the accused was not the primary caregiver of the minor. The Magistrate's reasons for sentence cannot be faulted as it incorporated the traditional factors such as the accused circumstances, community interest

and the seriousness and nature of the offence. He also considered other factors such as deterrence, retribution and rehabilitation.

[12] In my view, the only sentence the Magistrate could have imposed was one of direct imprisonment having regard to the aggravating factors such as the complainants R 6000.00 phone not being recovered, the opportunistic commission of the offence and the accused having previous convictions of not only theft, but also housebreaking with the intent to steal and theft, for which he is still under parole for until the year 2024.

[13] It is thus my view that the accused suffered no prejudice due to the absence of his right to legal representation not being explained to him at the start of the trial and more specifically, that his rights to a fair trial was not vitiated and thus did not result in a failure of justice. I accordingly make the following order:

ORDER

1. The conviction and sentence are confirmed.

OR. MAJOSI, AJ

I concur

C. REINDERS, J

[1] Constitution of the Republic of South Africa Act 108 of 1996

[2] S V Rudman and Another 1992 (1) SA 343 (A)

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