

SOUTH AFRICA / JUDGMENT

S v Mashaba (HC18/2024) [2024] ZANWHC 210 (12 August 2024)

[2024] ZANWHC 210**COURT**

North West High Court, Mafikeng

BEFORE

A Reddy, A H Petersen

CASE / FILE NUMBER

HC18/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG

REVIEW NUMBER: HC**18/2024****MAGISTRATE'S****SERIAL NUMBER: 09/2024****MAGISTRATE'S****CASE NUMBER: RE187/2024****Reportable:**

YES/NO

Circulate

to Judges: YES/NO

Circulate

to Magistrates: YES/NO

Circulate

to Regional Magistrates: YES/NO

In the review matter

between:

THE STATE

versus

SEUN

MASHABA

ACCUSED

DATE OF JUDGMENT: 12

AUGUST 2024

ORDER

(i)

The convictions and sentences on count 1, 2, 3 and 4 are confirmed.

(ii)

The order in terms of section 280(2) of the Criminal Procedure Act 51 of 1977 that the sentences are to run concurrently with any sentence the accused is serving is reviewed and set aside.

(iii)

In terms of section 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that the sentences of imprisonment imposed on counts 2, 3 and 4 are to run concurrently with the sentence of imprisonment imposed count 1.

(iv)

The order in terms of section 103 of the Firearms Control Act 60 of 2000, is amended to read: "In terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused is deemed ex lege unfit to possess a firearm.

REVIEW

JUDGMENT

REDDY J

[1] This matter served before me by way of automatic review as ensconced in section 302(1)(a) (i) of the Criminal Procedure Act 51 of 1977 ('the CPA'). The review record was placed before me on 30 May 2024. On 11 June 2024 I caused a query to be directed to the Magistrate. The Magistrate has replied adequately for which I

extend my gratitude.

[2] The only issues which merit attention pertains to the orders made in terms of section 280(2) of the CPA and section 103 of the Firearms Control Act 60 of 2000 ('the FCA').

- [3] On 24 January 2024 the accused was arrested for four (4) counts of assault with intent to do grievous bodily harm. On 25 January 2024, he made his first appearance before the Ga-Rankuwa Magistrates' Court. The accused rights to legal representation as enshrined in section 35(3)(g) of the Constitution were explained and he elected to conduct his own defence.
- [4] On 29 February 2024, the accused pleaded guilty to all four (4) counts. The Magistrate invoked the provisions of section 112(1)(b) of the CPA. The prosecution confirmed that the facts on which the plea of the accused was based were in accordance with the facts that formed the case for the prosecution. Resultantly, the accused was convicted on all four (4) counts of assault with intent to do grievous bodily harm.
- [5] The matter was postponed to 15 March 2024 for the prosecution to prove previous convictions of the accused as evinced in section 271(1) of the CPA. On 15 March 2024, the prosecution however, elected not to prove any previous convictions. The accused was consequently treated as a first offender. The inherent danger in this attitude of the prosecution, in circumstances where information was elicited that the accused was serving a sentence, is evident in the judgment on sentence.
- [6] Afore the conclusion of the sentencing process, the judgment on sentence by the Magistrate reads as follows:

"For each of the assault with intent to do grievous bodily harm and there are four offences of assault with intent to do grievous bodily, the accused is sentenced to one year imprisonment and because the Court is hopeful, hopeful that my words had some type of effect on you and that you will probably and hopefully from this day onwards walk a different path the Court is going to make an order in terms of section 280 (2) of the Criminal Procedure Act 51 of 1977 that these sentences will run concurrently with the sentence that you are now serving."

(my emphasis)

- [7] The sense and the substance of this order formed part of the body of the query which was directed to the Magistrate. The Magistrate retorted as follows:

"(iii) With regards to this aspect I concede that my statement is contradictory to the sentence imposed. I vehemently regret my oversight in this regard, the wording of the sentence does not disclose my true intentions. In all honesty, I meant for the sentences to run concurrently but conservatively with the sentence his serving. I did not mean for the imposed sentences to run concurrently with the sentence accused was in the process of serving. My regrets."

- [8] The Magistrate was not enjoined with a discretion to make such an order given that no previous convictions against the accused were proved. The order of the Magistrate is incompetent and stands to be reviewed and set aside.

[9] In an unreported review judgment of this Division *S v Mmusi*; and *S v Maruping* (Review Numbers: HC 08 and 09/2021; Magistrates' Serial Numbers: 10/2021 and 09/2021; Magistrate's Case Numbers: B289/2021 and B231/2021: Vryburg District Court), this Court warned against the non-possums attitude adopted by the prosecution with regards to its duty to prove previous convictions. The Court stated as follows:

The proving of previous convictions

[24] In *S v Sethokgoe* 1990 (2) SACR 544 (T), the court warned against the kind of stance adopted by the prosecutor in the present matter, when it said:

"The record of the proceedings contains the following:

'Public prosecutor: No records and accused may be regarded as first offender.'

I have encountered a similar situation in many reviews, especially in trials emanating from the homelands. The records either contain a passage similar to the one in the present review, or else there is no reference whatsoever to the form SAP 69. Almost invariably there is a request directed to the presiding magistrate to 'finalise' the matter without a record of previous convictions or a request that the trial be concluded forthwith in order to obviate further detention or delay. A judicial officer is obliged to proceed to sentence since the State has a discretion to produce a list of previous convictions and is not obliged to do so. (Section 271(1) of Act 51 of 1977; *S v Maphana* 1980 (1) SA 177 (V).) It is only where a list has been duly proved or admitted that a court is bound to take previous convictions into account. (Section 271(4) of Act 51 of 1977.)

The omission by a prosecutor to furnish a list of previous convictions, though permissible in terms of a discretion conferred upon him by s 271(1) *supra*, is an undesirable practice in circumstances where a list can conveniently and expeditiously be furnished. It obliges a judicial officer to impose sentences, as it were, in the dark. A SAP 69 form is often an invaluable aid. It may reveal that an accused has a propensity to commit certain types of offences and may even indicate a record of such proportion as to justify the imposition of an indeterminate sentence. It may be a record of such a nature as to require the matter to be referred to a regional court for sentence. At the least, a list of previous convictions may indicate a line of sentences which have not served as adequate deterrents, so that another approach may have to be adopted. On the other hand, a clean record or a relatively unsullied past may indicate to the court that the accused has made considerable efforts to reform his life, and the proof of the SAP 69 may well redound to his benefit. All these possibilities are precluded by a failure to furnish a list of previous convictions or an indication that the accused has a clean record."

[25] In the age of advanced technology, the warning extended in *S v Joaza* 2006 (2) SACR 296 (T) at 297G–I must be heeded:

"Previous convictions of an accused person certainly play an important role in the assessment of a fair and just sentence. Apart from the seriousness of the offence, it is a crucial determining factor to reflect an informed punishment which the offender deserves. If persons are simply regarded as first offenders and receive lenient sentences then the administration of our criminal justice system will invite societal

disdain. Although it is at the discretion of the prosecution to place the list of an offender's previous convictions before the court, I am of the view that it is prudent to do so in every case, thereby ensuring that the offender is rightly and judiciously sentenced. Let it be said that in this age of advanced information technology, any person's previous

convictions can easily and swiftly be obtained from the South African Criminal Bureau data bank. Therefore, there is no excuse why the prosecution should omit to furnish a recordal of previous convictions to the sentencing court.”

[26] In *S v Nhlapo* 2012 (2) SACR 358 (GSJ) at paras [14] – [16], the Court was more succinct on the duty of prosecutors in dealing with the issue of previous convictions:

“14 There is a disconcerting feature in this case which ought to be addressed. It concerns the extent of the prosecutor's duty (and by extension that of the investigating officer) to establish whether an offender has a previous conviction. In a number of cases the prosecutor no longer affirms that the SAP69 reflects the absence of previous convictions. Instead, the prosecutor informs the court, as in this case, that the docket does not contain a SAP69 and that the state does not intend proving any previous convictions. A SAP69 is a record extracted from the South African Police Criminal Record System. It details the offender's previous convictions, including the nature of the offence, the date of conviction and the sentence imposed. After conviction the state ordinarily produces this document in court and, in compliance with s 271(2) of the Criminal Procedure Act 51 of 1977 (the CPA), the offender is required by the court to admit or deny its contents. The offender will usually sign the SAP69 if the previous convictions are admitted, and the presiding officer will be requested to certify, by signing in the space provided on the document, that the previous convictions are admitted. The SAP69 will also state if there is no record of a previous conviction.

15. The practice mentioned earlier, of not even obtaining a SAP69 before deciding not to prove any previous convictions, if indeed it is a practice, falls short of the obligations that are implicitly imposed on a prosecutor in fulfilling his or her duty to the court in regard to sentencing. The duty of a prosecutor to place information before a court, that is relevant to the exercise of its discretion, in respect of bail is well understood and is apposite because there a court is obliged to exercise discretion within the confines of the CPA, and the public interest is also a relevant consideration.

16. Suffice that a prosecutor's duty embraces an obligation to protect the public interest and a duty to place before court information relevant to the exercise of its functions, within the limitations of the pressures under which prosecutors work. See *Carmichele v Minister of Safety and Security and Another* (Centre for Applied Legal Studies Intervening) 2002

(1) SACR 79 (CC) [2001] ZACC 22; (2001

(4) SA 938; 2001 (10) BCLR 995) in paras 72 and 73 in respect of bail. See also *S v Rozani; Rozani v Director of Public Prosecutions, Western Cape and Others* 2009

(1) SACR 540 (C) per Thring J at 549h – 550a; Du Toit et al Commentary on the Criminal Procedure Act 1 – 4T-6. Compare Kruger Hiemstra's Criminal Procedure (2008) at 1-6/7 who submits that prosecutors are ‘public officers who should assist the court in ascertaining the truth’.”

[10] Lastly, the order as crafted by the Magistrate in terms of section 103 of the FCA did not explicitly refer to section 103(1) and this was not pertinently raised with the Magistrate, same can be addressed by this Court within the purview of the review procedure. The Magistrate is reminded of the sentiments expressed in the review matter referred to above:

“The failure to conduct an enquiry envisaged by section 103 of the Firearms Control Act, Act 60 of 2000

[27] In respect of the failure to conduct an enquiry as envisaged by section 103 of the Firearms Control Act, I repeat what this Court said in the review matter of S v Godfrey Motau:

“[22] In S v Lukwe 2005

(2) SACR 578 (W) at 580a-d, Borchers J, stated in the context of a conviction of Theft where a term of imprisonment was wholly suspended that:

“The conviction and sentence imposed bring the matter within the ambit of s103(1) of the Firearms Control Act 60 of 2000, which reads as follows:

‘Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of –

(g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine.”

In my view, the sentence of 12 months’ imprisonment falls within these provisions despite the fact that it was wholly suspended.”

[23] In the present matter the accused was sentenced to direct imprisonment without the option of a fine wholly suspended for a crime involving dishonesty. The provisions of section 103(1) (g) of the Firearms Control Act are peremptory in the present matter.

[24] No enquiry was held in terms of section 103 of Act 60 of 2000. It is apposite to repeat what Borchers J said further at 580f-581a of Lukwe:

“... Where the matter is governed by s103(1), the accused is automatically deemed to be unfit to possess a firearm unless the court determines otherwise. The legislation does not expressly require the court to hold an enquiry into the accused’s fitness, but, in my view, particularly where an accused is unrepresented, the court should draw the accused’s attention to the provisions of s 103(1) and invite him, if he wishes to do so, to place facts before the court to enable the court to determine that he is indeed fit to possess a firearm...” (my emphasis)”

[11] It is imperative for a judicial officer to record specifically whether the order of unfitness to possess a firearm is in terms of sub-section (1) or (2) of section 103 of the FCA.

[12] The proceedings appear to be in accordance with justice but for the orders that stand to be reviewed and set aside; and corrected respectively.

Order

[13] In the result, the following order is made:

A REDDY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT

OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

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