
SOUTH AFRICA / JUDGMENT

S v Mentoor (C946/2018) [2019] ZAWCHC 139; 2020 (1) SACR 104 (WCC) (28 October 2019) [2019] ZAWCHC 139

COURT

Western Cape High Court, Cape Town

BEFORE

R.C.A. Henney, M.I. Samela

CASE / FILE NUMBER

C946/2018

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Samela, J et Henney, J)

High Court Ref No: 19429

Case No: C946/2018

Magistrate's Serial No: 22/2019

In the matter between:

THE STATE

vs

CHRISTOPHER MENTOOR

REVIEW JUDGMENT: 28 OCTOBER 2019

HENNEY, J

Introduction

- [1] The accused in this matter appeared on a charge of housebreaking, with the intent to steal and theft in the periodical court sitting at Riviersonderend, in the district of Caledon. The particulars of the charge is that on 11 December 2018, at or near [...] B Street in Riviersonderend, he unlawfully and intentionally with the intent to steal and theft, broke into the house of Russel Hendricks and stole a number of items as mentioned in the charge sheet, which was in the lawful possession of one, D. Fortuin.
- [2] After the initial arraignment before the Magistrate's court, the accused on 14 February 2019, after having decided to proceed without being legally represented, pleaded guilty to the charge against him.
- [3] He was questioned in terms of the provisions of section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 ("the CPA"),

whereafter the Magistrate convicted him of the offence charged. At that stage, the proceedings were postponed it seems, to acquire a Correctional as well as a Probation Officer's Report on 28 February 2019 thereafter 18 April 2019, 24 April 2019, 25 April 2019, 3 May 2019, 6 May 2019, 13 May 2019, 16 May 2019, 17 May 2019, 20 May 2019 and eventually on 30 May 2019.

- [4] He was eventually sentenced to a period of 24 months imprisonment in terms of section 276 (1) (i) of the CPA. With the following

additional order to the effect that the accused is only to be considered for release once he has completed (sic) the drug rehabilitation programme.

- [5] When this court initially dealt with this matter on review on 19 June 2019, requested the Magistrate to respond to the following query regarding the sentence he imposed:

"The Magistrate sentenced the accused to a period of 24 months imprisonment in terms of Section 276 (1)(i) of the Criminal Procedure Act 51 of 1977.

In the transcribed version of the record at page 11, the Magistrate makes the following additional order:

"The accused is only to be considered for release once he has completed the drug rehabilitation program."

On the J15 although barely legible it is stated: "condition – accused is to complete the drug rehabilitation before his release."

Was it competent for the Magistrate to make such an order/condition?"

- [6] The Magistrate duly replied to this query, I will deal with the reply to this query if necessary at a later stage. After having received an answer to this query, I transmitted a further query to the Magistrate on 13 August 2019, to the following effect;

“On a further perusal of the record, it seems that the accused pleaded guilty on the charge of house breaking with the intent to steal and theft on 14 February 2019. The Magistrate, it seems, without the record reflecting it, questioned the accused in terms of the provisions of Section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 (“CPA”), where after the accused was convicted.

It seems on 30 May 2019, the Magistrate proceeded with a “reconstruction” of the record of the proceedings, when he on 30 May 2019, proceeded to question the accused in terms of the provisions of Section 112 (1)(b) of the CPA, whereupon the accused was once again found guilty, “on the admissions you made on 14 February 2019”.

It seems that the accused during the second round of questioning, according to the Magistrate, gave a different answer to the question whether he knew that his conduct was wrongful when the accused answered as follows (record page 6) “... not at that moment Your Worship, because I was under the influence of drugs”.

[7] Then in further questioning and exchanges with the accused, the court proceeds as follows:

“Court: But do you know that to break into a house and steal items that do not belong to you is a punishable offence?”

Accused: Yes, Your Worship.

Court: And you know your actions were unlawful?

Accused: Confirm so, yes.

Court: When you say at the time you did not know that your actions, your conduct was wrongful, what do you mean Sir?

Accused: Because I was under the influence of drugs, Your Worship.

Court: And when did you realise that your actions was wrongful?

Accused: Three days after the theft, Your Worship.

Court: And what made you realise that three days after the event?

Accused: Your Worship, I came to my sober senses and I realised that I did something unlawful and I should expect the police officers any time soon.

Court: Sir, you did not mention this fact that you were so drugged up on the previous occasion when we took your plea that you did not understand that your actions were wrongful, because you clearly knew that you were breaking into the house to steal the items to sell and you were going to use the money to support your drug habit. Do you recall that?

Accused: Cannot remember.

Court: That is what you recorded, that is what you placed on record and that is why the court found you guilty.

Accused: Your Worship, the reason why I pleaded, I wanted the matter to finalise.

Court: But you see you said these things, because you wanted the matter to be finalised and today you are saying something different. But we are not going to change it, we are going to refer it to the Judge as we record it today. Just to mention that you did not mention the fact that you did not know it was wrongful for you to break into the house, because you were in a drug induced state at the time and that it is inconsistent with what you said initially that you went to the house, you broke the window, you gained entry to go and steal. Even today. Even today, not only that day, but today as well. Because when I asked you do you recall the events of the day you said yes. You said you went to that house in B. Street, you broke

the window, you opened the window, you got in, you stole the items. That shows that you knew exactly what you were doing. Do you follow?

Court: So, you cannot say at one stage that I knew what I was doing and give it in detail and then say that I was in a drug induced state, I did not know what I was doing. Do you follow?

Accused: [No audible answer].

Court: But we are not going to change that. We are going to send it to the Judge as you have said it. Do you dispute that the property belonged to, that the house belonged to Russel Hendricks and the property that you took belonged to D Fortuin?

Accused: I cannot dispute it Your Worship, because I do not know Mr Hendricks.

FINDING

So, based on what you have said, apart from the fact that you have now changed it, you were in a drug induced state and you did not appreciate what you were doing, the COURT FOUND YOU GUILTY ON THE ADMISSIONS YOU MADE ON 14 FEBRUARY 2019. Not that you were under, but you were under such a degree of influence that you could not understand what was happening.

Court: Do you understand?

Court: But that is all. We are going to send it to the Judge because that is how I had it from my recollection of what happened and we are going to send what is recorded now, which apart from the part where you say you were very, very drugged up that you did not understand what you were doing. Before you go, sir. Do you confirm everything according to your recollection is the same as it happened on 14 February 2019?"

Given what transpired in the proceedings before the Magistrate, I have a few concerns. These are:

- 1) Was the proceedings properly reconstructed? In this regard, the Magistrate is referred to the following cases: S v Schoombee

and another 2017 (2) SACR 1 at page 6 – 7; S v Gora and another 2010 (1) SACR 159 WCC. S v Zenzile 2009 (2) SACR 407 (WCC).

- 2) What material or evidence was used for the reconstruction?
- 3) Did the Clerk of the Court file an Affidavit to explain what happened to the proceedings on 14 February 2019 wherein he/she also stated that despite their best endeavours, they were unable to trace the record?
- 4) Did the prosecutor and the accused (apart from being questioned in terms of section 112(1)(b)), participate in the reconstruction proceedings?
- 5) Was it proper to once again question and convict the accused in terms of section 112 (1)(b)? Should he not only have confirmed what happened previously with the concurrence of the prosecutor?
- 6) On what basis did the Magistrate contend that the answers to the questions the accused gave on 30 May 2019 differed from the answers

he gave on 14 February 2019?

- 7) Should the matter not have been referred for Special Review in terms of the provisions of section 304A, because of the absence of a proper record of the proceedings of 14 February 2019 and secondly, after the accused recanted the admission of knowledge of unlawfulness, for the proceedings to be set aside.”
- [8] The Magistrate also furnished an answer to this query on 23 August 2018, which was sent to the High Court on 6 September 2019. In my view, it would be appropriate to firstly deal with the second query, because it will have an influence on the earlier query dealing with the sentencing proceedings.
- [9] In his answer to the second query, the Magistrate concedes that in hindsight and after having regard to the case law that he did not follow the proper procedure in the reconstruction of the record. And he says he would therefore leave it in the hands of this reviewing court for direction.
- [10] On the question as to what material he used to reconstruct the matter, he says that the material used were his notes that he had taken during the proceedings on 14 February 2019, which was a plea in terms of section 112 (1) (a) of the CPA. This must clearly be a mistake because the proceedings were not in terms of section 112
- (1) (a), but a questioning of the accused of section 112 (1) (b) of the CPA. He furthermore stressed that his notes were a documentation of the questions which he had posed to the accused and the replies of the accused to the questions which he posed to him.
- [11] He was requested by the head of office to recreate the record from his documented notes and to read it into the record in the presence of the parties and have them confirm it. And he immediately had a record typed which he attached as annexure A. He furthermore states

that it was shown to the prosecutor, and to the accused when he was brought to him to the periodical court where he was sitting. This was done because the accused was serving a sentence and he had to be requisitioned to appear in the periodical court. At that stage it was informally read to him and he agreed to it, before they started with the formal recording of the proceedings.

- [12] He furthermore states as the formal recording was done in the form of the plea proceedings, he could not place the contents of annexure A on the record. It was therefore not made part of the formal record and he attached it to his reply to the query. On the question whether it was proper to once again question and convict the accused in terms of section 112 (1) (b) of the CPA and whether the prosecutor should not only have confirmed what happened previously with concurrence of the accused, the Magistrate says that he did this for completeness of the record. And he found it relevant and necessary to once again question the accused.
- [13] He submitted that based on the authorities to which he was referred to in the query, that the record although defective need not be perfect. And was furthermore of the view that the imperfect record will not necessarily prejudice the accused just because of an error in the reconstruction process. He is of the view that the record is adequate for the purposes of review unless it can be found that the conviction of the accused amounts to a gross misdirection.
- [14] He furthermore says that he accepted the answers to the questioning that the accused gave on 14 February 2019 to be the proper and correct answers as opposed to the answers to the questions that the accused had given when he was once again during the “reconstructed” questioning in terms of 112 (1) (b) that was conducted on 30 May 2019 because it was based on the “reconstructed” version as set out in annexure A, which formed part of his answer to this court query.
- [15] He concedes that this this matter should rather have been referred for special review in terms of the provisions of section 304 A of the CPA, due to the absence of a proper record of the proceedings of 14 February 2019 and secondly because the accused during his second questioning, denied that when he committed the offence, he knew that what he was doing was wrong and could be punished for it, which he initially admitted during the proceedings on 14 February 2019.
- [16] The record dated 30 of May 2019, although mention is made of a “reconstruction”, does not reflect any evidence of any such reconstruction, but rather illustrates that the Magistrate embarked with entirely different proceedings to question the accused de novo in terms of the provisions of section 112 (1) (b). The reconstructed version, if it was there, was one that should have been included in the record of the proceedings of 30 May 2019 and which should also have been included in the review record. I do not understand why the Magistrate, says that he could not place the contents of annexure A on the record. It was part of the proceedings of that particular day and it was a court of record, in terms of

section 4 of the Magistrates Courts Act 32 of 1944 which states ...

“(1) Every court shall be a court of record.

(2) ...

(3) ...

(4) ...

Rule 66 (1) deals with the records of criminal cases in terms of the Rules Regulating the Conduct of Proceedings in the Magistrates Court,

provides that “the plea and explanation or statement, if any, of the accused, the evidence orally given, any exception or objection taken in the course of the proceedings, the rulings and judgment of the court and any other portion of criminal proceedings, may be noted in shorthand... either verbatim or in narrative form” or may be recorded “by mechanical means.” (emphasis added).

And in terms of Rule 66 (5) ... Subject to the provisions of subrule (6), any shorthand notes and any transcript thereof, certified as correct, shall be deemed to be correct and shall form part of the record of the proceedings in question”.

I have with respect to the Magistrate, grave difficulties with the answers he had given in reply to this query.

[17] It seems in any event that the so-called reconstruction of the proceedings of 14 February 2019, as set out in annexure A which

according to the Magistrate was in the form of shorthand notes did not comply with the provisions of above-mentioned subrule because it was not certified by him as correct. It is for this very reason that Magistrates are required, prior to a criminal case being submitted for review (on the J 4) or where a matter had been sent on appeal to certify that the proceedings as transcribed after it had been recorded, is correct. The subrule is also applicable where any notes made by the Magistrate during the course of the proceedings are used in the reconstruction of the record, which requires the Magistrate also to certify it as correct. This in relation to the procedure followed when an accused person is questioned in terms of section 112

(1) (b) said the following: In *S v Fransman & another* 2018

(2) SACR 250 (WCC) at

[13] that the presiding judicial officer conducting the questioning 'should take special care to ensure that the questioning of the accused is carried out carefully and with scrupulous regard for the elements relevant to the charges at hand, and it should further appear from the contents of the record that such questioning took place in a clear manner and in terms which the accused understood. In addition, in the case of a written notation of the questioning, the record ought, as far as possible, to be a reproduction of what actually

transpired, and should not simply be an ex post facto attempt at reconstructing what the Magistrate believes to be the gist of what was said, for, by doing so, aspects of what was essentially evidentiary material before the court might, to use a colloquial phrase, thereby be lost in the subsequent “translation”.

[18] The Magistrate’s Court for the purposes it was constituted on 30 May 2019, was a proper court. I fail to understand the

Magistrate’s reasoning that his reconstructed notes of the proceedings on 14 February 2019, was “informally”, read to him (the accused) and he agreed to it (sic) before they started with the formal recording of the “reconstructed” proceedings if the accused was brought to court for this specific purpose and made a formal appearance.

All the appearances of an accused person in court takes place in terms of the provisions of the Criminal Procedure Act and in particular section 12 of Magistrate’s Court Act , which states...”

12 Powers of judicial officers

(1) A Magistrate —

- (a) may hold a court..;
- (b) shall possess the powers and perform the duties conferred or imposed upon Magistrates by any law for the time being in force within the province wherein his district is situate;
- (c)...

(2) An additional Magistrate or an assistant Magistrate —

- (a) may hold a court;
- (b) shall possess such powers and perform such duties conferred or imposed upon Magistrates by law.
- (3) An acting Magistrate, additional Magistrate, or assistant Magistrate, respectively, shall possess the powers and jurisdiction and perform the duties of the Magistrate, additional Magistrate, or assistant Magistrate in whose place he is appointed to act, for the particular case or during the time or in the circumstances for which he is appointed to act.

(4)

(5)”

[19] And nothing can be done in an informal manner and that includes the confirmation of the reconstructed record by an accused person and all the other parties involved. It is clear that the Magistrate thought that he could “reconstruct” the proceedings by embarking on a process whereby having the charge put again to the accused whereupon he proceeded to once again question the accused de novo and convict him. He could not have done that,

because the proceedings, although the record was incomplete was still in existence and not set aside for him to have embarked on such a procedure.

- [20] The law does not permit an accused to be questioned on the same charge on more than one occasion in terms of the provisions of section 112 (1) (b) of the CPA, unless those proceedings had been set aside on review or appeal by the High Court and an order is made that the proceedings should start de novo. The law does not permit the person to be convicted on the same charge dealing with the same facts more than once. Section 35(3) (1) of the Constitution states that an accused is “not to be convicted for an offence in respect of an act or omission which that person has previously been either acquitted or convicted”. It is also a competent plea that an accused can raise in terms of section 106 (1) (c) of the CPA, which is, that he has already been convicted of the offence with which he is charged.
- [21] Although it may not have been the intention of the Magistrate due to lack of experience and lack of knowledge as to how to reconstruct a record, it resulted in him clearly having questioned and convicted the accused on the basis of the provisions of section 112 (1) (b) on 30 May 2019, after he had previously on 14 February 2019 had already questioned the accused in terms of section 112 (1) (b) and convicted him. He should at that stage, especially in the light of the fact that the accused denied that he knew that what he was doing was wrong and that he could be punished for it, stopped the proceedings and refer it for review provisions of section 304A, for the conviction of 14 February 2019, where the accused denied that he admitted an essential element, be set aside. See *S v MSOMI* 2009 (1) SACR 441 (N).
- [22] Whilst it is not necessary for me to deal with the sentence that was imposed by the Magistrate, it would be appropriate because of the query I referred to him in this regard, to comment thereon. It is clear that the Magistrate made an ancillary order to the effect that the Department of Correctional Services should not release the accused before he underwent rehabilitation in prison. In my view, the Magistrate could not have made such an order because it would interfere with the proper exercise of the functions of the Commissioner of Correctional Services. In my view, a court let alone the Magistrate’s Court, does not have such wide powers.
- [23] In the result therefore, I am of the view, that based on the fact that the accused was questioned in terms of the provisions of section 112 (1) (b) of the Act, more than once, firstly, on 14 February 2019 and convicted thereafter and also on 30 May 2019 once again, convicted, the proceedings were not in accordance with justice and falls to be set aside.
- [24] Furthermore, it was not competent for the Magistrate to have made a decision that he preferred the accused’s version of the plea given to him on 14 February 2019, wherein he admitted all the elements of the offence and convicted him, over the version dated 30 May 2019, where the accused did not admit to all the elements of the offence more especially an essential element such as knowledge of unlawfulness.
- [25] I would therefore make the following order:

- 1) that the conviction of the accused dated 14 February 2019 is set aside;
- 2) the conviction and sentence of the accused dated 30 May 2019 is also set aside;
- 3) that the Director of Public Prosecutions make a decision whether to prosecute the accused afresh on the charges of which he was accused in these proceedings.

R.C.A. HENNEY

Judge of the High Court

I agree, it is so ordered.

M. I. SAMELA

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