

SOUTH AFRICA / JUDGMENT

S v Mhlola; S v Motselbane (A1052-17; A988-17) [2018] ZAWCHC 100; 2019 (2) SACR 422 (WCC) (17 August 2018) [2018] ZAWCHC 100

COURT

Western Cape High Court, Cape Town

BEFORE

Cloete, Engers

CASE / FILE NUMBER

A1052/17; A988/17

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Ref Nos: 18803 and 18804

Magistrate's Serial Nos: A1052/2017 and A988/2017

Special Reviews: 02/18 and 04/18

In the matters between:

THE STATE

v

NONKOSI MHLOLA Case no: A1052/17

and

NELSON MOTSELBANE Case no: A988/17

SPECIAL REVIEW JUDGMENT DATED 17 AUGUST 2018 IN TERMS OF

SECTION 304(4) OF ACT 51 OF 1977

CLOETE J:

- [1] The issue in both of these matters is whether a prosecutor is entitled to fix the amount of an admission of guilt fine which is in excess of a determination made under s 57(5)(a) of the Criminal Procedure Act 51 of 1977 ('the Act') and, if so, whether a magistrate is bound to confirm it when exercising his or her discretion under s 57(7) thereof.

[2] The relevant part of ss 57(5)(a) and (b) of the Act reads as follows:

‘(5)(a) An admission of guilt fine stipulated in respect of a summons or a written notice shall be in accordance with a determination which the magistrate of the district or area in question may from time to time make in respect of any offence or, if the magistrate has not made such a determination, in accordance with an amount determined in respect of any particular summons or any particular written notice by... a public prosecutor attached to the court of such magistrate...

(b) An admission of guilt fine determined under paragraph (a) shall not exceed the maximum of the fine prescribed in respect of the offence in question or the amount determined by the Minister from time to time by notice in the Gazette, whichever is the lesser.’

[emphasis supplied]

[3] Both accused were charged with contravening s 4(b) of the Drugs and Drug Trafficking Act 140 of

1992. Section 13(d) read with s 17(d) thereof prescribes the statutory penalty for such an offence as being ‘such fine as the court may deem fit to impose or imprisonment for a period not exceeding 15 years, or to both such fine and such imprisonment’. There is accordingly no statutorily prescribed maximum fine for such a contravention. The ordinary jurisdictional limit would otherwise apply, which for magistrates courts is R120 000 in terms of s 92(1)(b) of the Magistrates’ Court Act 32 of 1944 read with GN 217 of 27 March 2014. However in terms of s 57(5)(b) of the Act, the maximum amount is limited to that determined by the Minister, which is currently R10 000 in terms of GN R62 in GG 36111 of 30 January 2013.

[4] In case no. A1052/17 the accused was charged with possession of 12 stoppe of dagga. The prosecutor fixed an admission of guilt fine at R1 200, i.e. R100 per stop of dagga in the s 57(5) (a) notice. The accused paid the fine.

[5] In case no. A988/2017 the accused was charged with a similar contravention, having been found in possession of 23 stoppe of dagga. The same sequence of events followed, save that the prosecutor fixed the admission of guilt fine at R2 300.

[6] The current determination applicable to the District of Strand in terms of s 57(5)(a) provides that, although a maximum fine of R100 per stop of dagga may be imposed, a fine may only be imposed, for purposes of admission of guilt under s 57, for a maximum of 10 stoppe of dagga. If the charge relates to 11 or more stoppe then no admission of guilt fine may be fixed and the accused must be prosecuted in the ordinary course.

[7] The learned magistrate advised that she set aside the conviction and sentence in each instance because she was of the view that the admission of guilt fine paid was not in the interests of justice, having regard to the determination made for the District of Strand and the serious nature of the offence. She thus directed that each accused be prosecuted in the ordinary course in terms of s 57(7) of the Act.

[8] The learned magistrate also advised that the prosecutor at Strand holds the view that s 57(4) of the Act should be interpreted in such a manner that the prosecutor nonetheless retains a discretion to impose the fines that she did. This sub-section provides that:

‘No provision of this section shall be construed as preventing a public prosecutor attached to the court concerned from reducing an admission of guilt fine on good cause shown.’

[9] The prosecutor thus asked the magistrate to submit the setting aside of the two convictions and sentences for special review ‘as she holds the view that I am not entitled to set aside the conviction and sentence for the reasons submitted above, and I am required to simply confirm her decision to reduce the admission of guilt fine’ in each instance. By ‘reduce’ I understand the magistrate to mean the prosecutor’s entitlement to fix an admission of guilt fine in an amount less than

that determined by the Minister of R10 000 in circumstances where no magisterial determination exists.

[10] The prosecutor did not provide any submissions in this regard which she was, of course, at liberty to do.

[11] The magistrate however annexed a letter addressed to her by – it would appear – the control prosecutor at Strand in which it was stated that her decisions are reviewable because:

‘I am of the opinion that the prosecutor was entitled to determine an admission of guilt [fine] in terms of section 57A exceeding the maximum determination which the magistrate has made.’

[12] Section 57A was applicable in both instances because both accused paid the fines after receiving the notice to appear and appearing in court but before pleading. Nothing turns on this since s 57A(4) makes the provisions of s 57(2) to (7) applicable in such instances.

[13] In case no. A1052/2017 the notice to appear served on the accused stipulated that an admission of guilt fine of R1 200 was payable in respect of the charges. In case no. A988/2017 the notice stipulated that an admission of guilt fine of R2 300 was payable. Accordingly, in both such notices the admission of guilt fine stipulated was not in accordance with the determination made by the magistrate for the District of Strand, and exceeded such determination. Section 57(5)(a) makes it clear that it is only in instances where a magistrate has not made such a determination that the admission of guilt fine in a notice may be fixed by a prosecutor.

[14] It follows that both such notices were issued ultra vires the statutory provisions of s 57(5)(a). This alone rendered the proceedings resulting in payment of the admission of guilt fines irregular.

[15] Furthermore, ss 57(6) and

(7) of the Act provide that:

‘(6) An admission of guilt fine paid... shall, as soon as is expedient, be forwarded to the clerk of the magistrate’s court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars... in the criminal record book for admissions of guilt, whereupon the accused concerned shall, subject to the provisions of subsection (7), be deemed to have been convicted and sentenced by the court in respect of the offence in question.

(7) The judicial officer presiding at the court in question shall examine the documents and if it appears to him that a conviction or sentence under subsection (6) is not in accordance with justice or that any such sentence, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the sentence is not adequate, such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course...’

[16] To my mind, a reading of ss 57(4) to (7) as a whole makes it clear that the prosecutor’s discretion under s 57(4) is limited to reducing the amount of an admission of guilt fine on good cause shown to an amount less than a determination made under s 57(5)(a) where such determination has been made. Moreover, it is for the judicial officer concerned,

not the prosecutor, to determine whether or not ‘a conviction or sentence under subsection (6) is not in accordance with justice or that any such sentence, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5)’ [my emphasis]. Any other interpretation would lead to the absurd result that the powers of a judicial officer under subsection 57(7) are subject to a prosecutor’s overriding discretion under s 57(4).

[17] It is accordingly my view that the magistrate was correct in setting aside the convictions and sentences and directing that the accused be prosecuted in the ordinary course.

[18] The following order is thus made:

1. The setting aside of the conviction and sentence in both case numbers A1052/2017 and A988/2017 is confirmed.
2. The fines paid by the accused are to be refunded forthwith.
3. The accused are to be prosecuted in the ordinary course as provided for in section 57(7) of Act 51 of 1977.

CLOETE J

ENGERS AJ

I agree.

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