

SOUTH AFRICA / JUDGMENT

S v Mohadin (25/2022; 9/451/2021; 01/2022) [2022] ZAWCHC 59 (25 April 2022)

[2022] ZAWCHC 59

COURT

Western Cape High Court, Cape Town

BEFORE

Nziweni, Lekhuleni

CASE / FILE NUMBER

25/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

HIGH COURT REF NO: 25/2022

REVIEW CASE NO.: 9/451/2021

MAGISTRATE'S SERIAL NO.: 01/2022

In the matter between: THE STATE and SALAMDIN MOHADIN Accused

JUDGMENT DELIVERED: MONDAY, 25 APRIL 2022

Nziweni AJ:

[1] This matter came before me, on automatic review in terms of section 302 (1) of the Criminal Procedure Act, 51 of 1977, ("the Act"). Before the magistrate, the accused was facing a charge of theft. He pleaded guilty to the charge. After questioning by the magistrate in terms of section 112 (1) (b) of the Act, the

accused was found guilty on the strength of his plea. He was then sentenced to 12 months imprisonment.

[2] The questioning of the accused reveals the following:

"Q: According to the charge sheet it is alleged that on the 21st day of July 2021 and at Shoprite Maynard Mall in the district of Wynberg you unlawfully and intentionally stole shopping bags, 500 ml shower-gel, exquisite cake, 2kg sugar, sta-soft touch, sipmen & cheese the property of Shoprite/Nolindo Bulawa

A: Yes

Q: Describe the events /facts that led to your arrests?

A: I went to Shoprite and I did not have any money to pay for these items, and I took these things with no permission.

Q: Did you have any money to pay for these items, in other words did you have any intention to pay for these items?

A: No

Q: Did the owner of the property give you consent or permission to remove the items from his/her custody?

Do you agree that you permanently wanted to deprive the owner of his/her property?

Q: According to the charge sheet, the total value of the items/ goods concerned is R550.92; do you have any reason to believe that the total value mentioned in the charge sheet are correct?

A: It's correct

Q: Did you know at the time of the incident that your conduct was wrongful, unlawful and that you are committing an offence punishable in a court of law?

Q: Do you have any lawful excuse or reason to act in the manner that you described before this court?

FINDING

· The court is satisfied that you are guilty of the offence to which you have pleaded.”

[3] After my reading of the questions posed by the magistrate and the answers given by the accused, I was left with an impression that there was a lacunae in the plea. I then addressed a query to the magistrates in the following terms:

1. “In light of the answers given by the accused during the questioning in terms of section 112 (1) (b) of the Criminal Procedure Act, 51 of 1977 (the Act); it is quite discernible that the facts surrounding the commission of the offence are not set out clearly.

As a result, important questions remain unanswered, because crucial information was not brought to light.

2. It is my considered view that there are certain shortcomings in the answers given by the accused.
3. I get the distinct impression that the accused only made a series of admissions, without setting out any additional facts to support

the admissions. Consequently, the answers proffered by the accused do not exclude every imaginable defence.

4. In the context of this case; the magistrate is requested to provide reasons as to why her decision should not be set aside and the matter be referred back to her, for proper questioning of the accused in accordance with the provisions of section 112 (1) (b) of the Act.

[4] The magistrate in her reply conceded that the questioning in terms of section 112

(1) (b) of the Act, did not elucidate adequate facts. In her response, the learned magistrate inter alia agreed that in hindsight the admissions offered by the accused lacked the necessary facts to support them. The concession in my view, was well made and correct.

[5] It is critical and paramount for a judicial officer to understand that the procedure prescribed by section 112 (1) (b) is to safeguard the rights of an accused person who intends to plead guilty. When a court undertakes the task of questioning the accused person it has to be vigilant. It is important for the court doing the questioning to understand the dynamics of the charge the accused is facing. This will assist the court to be able to understand which elements of the offence the accused is admitting to as he relates the events and circumstances surrounding the commission of the offence.

[6] The court also needs to be conscious of the nature of information needed to support the admissions made by the accused. There should always be sufficient facts to support commission of a criminal act. I do appreciate that there may well be differences in the technique of questioning, but not in principle. See *Negondeni v the State* (00093/15) [2015] ZASCA 132 (29 September 2015)

[7] The unfortunate problem and challenge is that when the questioning is not correctly done, the rights of an accused person can be compromised immensely. Hiemstra in *Criminal Procedure* succinctly puts it as follows:

“The primary purpose of questioning should always be born in mind, namely to safe guard the accused against the result of an unjustified plea of guilty. ...Throughout the questioning the presiding officer will remain conscious of the duty of the court to ensure that justice is seen to be done . . . As the investigation is in fact aimed at the protection of the accused person . . . In questioning the accused the court should do more than merely ask whether he or she admit the allegations in the charge. By pleading guilty, the accused has already done so. It may for that reason also be insufficient to ask the accused step by step to admit every allegation in the charge sheet . . . Section 112 tests the presiding officer’s knowledge of substantive criminal law (my own underlining) . . . Finally, regarding the issue of questioning, it must be borne in mind that too much haste often causes delays. A plea of guilty without substructure will probably have to be corrected . . .”

[8] At the outset it should be pointed out that it is quite clear that the objective of the procedure contemplated by section 112

(1) (b) is to ensure that:

- (a) an unrepresented accused person is fully questioned by the court to make sure that the admissions he /she makes are backed up by

facts.

- (b) greatest care must be taken to ensure that the admission is not a product of ignorance, but the accused fully understands the meaning and the effects of the admissions he/she is making. The court should make every effort to ensure that the admission is interrogated. See *S v Sellars and Others* 1991 (1) SACR 491 (N)
- (c) the accused does not admit something beyond the scope of his/or her personal knowledge.
- (d) that a person who wants to admit guilt to a serious offence is indeed guilty of the offence preferred against him/her.
- (e) That a person who did not commit an offence he pleads guilty to is not wrongfully convicted and imprisoned
- (f) a full investigation relating to the circumstances or facts under which the offence was committed is undertaken.
- (g) There is a nexus between the facts and the circumstances as related by the accused and the charge/s he is facing.
- [9] The above mentioned should not be considered as exhaustive.
- [10] Without doubt, when an accused person tells how the events unfolded, it is not sufficient to state that:
- “I went to Shoprite and I did not have any money to pay for these items, and I took these things with no permission.”*
- [11] Manifestly, when the accused was asked by the court to relate what happened in the shop, he gave a very terse response, which did not reveal any details. Even though the accused made critical admissions, but clearly there are certain facts upon which he admitted the guilt, which are lacking.
- [12] Needless to say; that it is quite discernible that the facts surrounding the commission of the offence are not set out clearly. As a result, important questions remain unanswered, because crucial information was not brought to light on record due to an inadvertence. What is further interesting in this matter is that the questions posed by the court to the accused related to the allegations in the charge sheet. Consequently, a lacuna was created in the plea.
- [13] Important questions remain unanswered. For instance:
- (a) Where in the shop did the accused take the items from?;
- (b) After he took the items what did he do with them?;

- (c) What made him not to be successful with his intended criminal act?;
- (d) How was he arrested?; and
- (e) Where was he found with the items?

[14] And far more important, I cannot be faulted for concluding that the accused in this matter only made a series of admissions, without setting out any additional facts to support the admissions. Consequently, the answers proffered by the accused do not exclude every imaginable defence. The inadvertent corollary of this is that the questioning by the learned magistrate was not adequate to satisfy the requirements of s 112 (1)(b) of the Act.

Conclusion

[15] Section 312 (1) of the Act, under the heading, “review or appeal and failure to comply with subsection (1)(b) or (2) of section 112”; states the following:

“(1) Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1)(b) or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be.”

[16] In the context of this case, I did consider whether it would be the best course of action to direct that the matter should start de novo before another magistrate. However, I am acutely aware that this course of action can lead to unnecessary delays.

[17] Furthermore, in light of the fact that the accused has spent time in custody, partly serving a sentence, which he should not have served; I hold the view that the magistrate that is fully aware of the circumstances of this matter will be best equipped to handle the sentence proceedings. Of course, that is if the accused still elects to plead guilty. I therefore, do not foresee that any prejudice would be occasioned by the choice.

[18] Given the fact that the accused has already served prison term, towards a sentence; I implore the magistrate to earnestly consider at sentencing time, the period served by the accused in custody, when she weighs her sentence options.

[19] If the accused indicates that he no longer wishes to plead guilty, then the matter should be referred to start de novo before another magistrate.

[20] Accordingly, I make the following order

- (a) The conviction and sentence are hereby set aside. The matter is remitted back to the magistrate for her to properly question the accused in terms of section 112 (1) (b) and further deal with the matter in accordance with the law.
- (b) The matter should be treated as a matter of urgency.

- (c) The accused should be requisitioned from the correction centre within three days of the receipt of the record, in order for the proceedings to resume. Accordingly, efforts should be made to ensure that the proceedings are not delayed.

NZIWENI, AJ

I agree, and it is so ordered.

LEKHULENI, J

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