

SOUTH AFRICA / JUDGMENT

S v Mtshali (R41/2025) [2025] ZAKZPHC 16;

2025 (1) SACR 665 (KZP) (21 February 2025)

[2025] ZAKZPHC 16

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mossop, E. Bezuidenhout

CASE / FILE NUMBER

R41/2025

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FLYNOTES:

CRIMINAL – Shoplifting – Sentence – Review
– Incongruence between amount of fine and alternative period of detention – Too harsh when compared with quantum of fine imposed – Aggressive attitude manifested by additional magistrate during proceedings – Derogatory and insulting remarks towards accused – Undermined dignity of court and accused – Declaration as unfit to possess firearm unjustified – Conviction confirmed – Sentence replaced – Criminal Procedure Act 51 of 1977, s 112(1)(a).
IN THE HIGH
COURT OF SOUTH AFRICA
KWAZULU-NATAL
DIVISION, PIETERMARITZBURG
Case number: R41/2025

In the matter between:

THE
STATE
and
NHLAKANIPHO
MTSHALI

Coram: Mossop J and E. Bezuidenhout J
Judgment
received: 14 February 2025
Review
judgment delivered: 21 February 2025
ORDER
The following order is

granted: 1.
The conviction of Mr Mtshali is confirmed.
2.
The sentence imposed upon Mr Mtshali is set aside
and replaced with

the following sentence: 'Mr
Mtshali is sentenced to pay a fine of R500 or in default of payment
to undergo imprisonment for a period of 30 days.'
3.
Mr Mtshali's disqualification from possessing
a firearm in
terms of s 103(1) of the Firearms Control Act 60 of 2000 is set
aside.
4.
If Mr Mtshali has not paid the fine initially imposed
by the
magistrate and has consequently been incarcerated for a period of six
months, the Registrar of this court is directed to
forthwith inform
the Department of Correctional Service of the variation of the
sentence.
5.
A copy of this judgment is to be sent by the
Registrar of this court
to the magistrate of the Newcastle Magistrate's Court for his
consideration.
REVIEW

JUDGMENT

MOSSOP J (E BEZUIDENHOUT J concurring):

- [1] This matter has been received on review from the magistrate of Newcastle, KwaZulu-Natal. The accused, Mr Nhlakanipho Mtshali (Mr Mtshali) was charged with stealing two tins of shoe polish with an alleged value of R170 from a Spar store in Madadeni. He was unrepresented when he appeared before the additional magistrate of Newcastle (the additional magistrate) but pleaded guilty when called upon to plead and was duly convicted on that plea which was tendered in terms of section 112(1)(a) of the Criminal Procedure Act 51 of 1977 (the Act).[1] He was sentenced to pay a fine of R500 or in default of payment to undergo six months imprisonment. In terms of s 103(1) of Act 60 of 2000 he was declared to

be unfit to possess a firearm.

- [2] The matter is reviewable in terms of the provisions of s 302(1)(a) of the Act[2] by virtue of the fact that the additional magistrate that dealt with Mr Mtshali was only appointed to the position of additional magistrate on 1 July 2024.
- [3] I am concerned with a number of issues arising out of the proceedings in which Mr Mtshali was convicted and sentenced, and I deal sequentially with each of them.
- [4] Mr Mtshali was charged with shoplifting, an offence that he freely admitted in tendering his plea. How Mr Mtshali stole the two tins of shoe polish was not considered at the plea stage given the fact that s 112(1)(a) of the Act was invoked to convict him. During mitigation of sentence a few of those details emerged. It appears to me that on a conspectus of all the available information Mr Mtshali intended to plead guilty and was guilty of shoplifting. His conviction was therefore in order. However, the sage words of Olsen J of this division in *S v Gumede and others*,^[3] continue to resonate, namely that:

‘There appears to be little scope for exercising a discretion in favour of proceeding under s 112(1)(a) when the accused is unrepresented.’

I would, in the circumstances suggest that s 112(1)(a) should be cautiously applied where the accused person is unrepresented. The criminal justice system, after all, strives to ensure that only truly guilty people are convicted and the possibility of that occurring where an accused person is not represented is heightened.

- [5] The next disquieting aspect of what occurred is the nature of the sentence imposed upon Mr Mtshali. There is an incongruence between the amount of the fine, R500, and the alternative period of detention, 6 months. The alternative sentence of imprisonment appears to me to be too harsh when compared with the quantum of the fine imposed. Fines that are imposed are not always paid and the consequence is that the term of imprisonment must be served. Care must thus be taken to ensure that two sentences are in balance with each other. Considering that s 112(1)(a) of the Act was applied, the proper sentence should have been a fine of R500 or an alternative period of incarceration of 30 days. The sentence of the additional magistrate shall accordingly be altered to reflect that.
- [6] I have no way of knowing whether Mr Mtshali paid the fine imposed upon him or chose to undergo the imposed sentence of imprisonment. It is possible that he did not pay and with that in mind this judgment has been prepared in some haste.
- [7] The next issue to be considered is the fact that Mr Mtshali was found to be unfit to possess a firearm as a consequence of his conviction. The basis for this finding escapes me. Section 103(1) of the Firearms Control Act 60 of 2000 (the FCA) sets out 15 offences upon the establishment of which will require a court to make a determination of whether the convicted person should be declared incompetent to possess a firearm. Theft is not one of those offences.^[4] Dishonesty is, however, mentioned in s 103(1)(g), but only in the context of a term of imprisonment without the option of a fine. Spending even a second in thought

would have led to the realisation that s 103(1)(g) could not apply because of the use of s 112(1)(a) of the Act which requires the imposition of a fine. There is no other sub-section in the FCA that entitled the magistrate to disqualify Mr Mtshali from possessing a firearm in the future. No order of disqualification could, or should, have been ordered and that finding must be set aside.

[8] The areas of concern just mentioned are all capable of being remedied by a higher court. What is profoundly disturbing, however, and which cannot be cured by a reviewing court, is the aggressive attitude manifested by the additional magistrate during the proceedings over which she presided. They were brief given the plea of Mr Mtshali and the sparse reasons given by the additional magistrate for convicting him and then sentencing him. But despite this, there are several disturbing moments in the proceedings where the additional magistrate acted in an unacceptable manner.

[9] The first disturbing incident occurred before Mr Mtshali pleaded. It went like this:

‘COURT: Thank you. Mr Mtshali, stop what you are doing. Even yesterday I did warn you. You’re not a makoti[5] here ... [vernacular]. You look straight into me when I’m talking to you and when you are answering you face the Court, you do not look down and when you are talking you talk until I can hear what you’re saying, because you can hear me and I cannot hear you and who is the fool now? Is it me or you? It is me. So stop that. Where is your proof of schooling?’

[10] This was the forerunner of a more unpalatable outburst by the additional magistrate that later occurred, which encompassed the following:

‘COURT: Thank you. You can sit down. Yes, Mr Mntambo, would you – can you kindly address in aggravation?’

PROSECUTOR: I had already addressed, Your Worship.

COURT: Oh yes, yes, you did. Thank you, sir. Stand up. Do you want to know how I knew that everything you were saying you were lying to me, because I am not a sangoma and I’m not a prophet?

ACCUSED: ... [no audible reply]

COURT: It is your poor acting. You act like you are, you are shy when you are looking down and speaking softly. I can tell that you are the worst of the worst. The court will sentence you as follows.’

[11] A judicial officer is expected to behave courteously to all people appearing before him or her. As was stated in *Khuboni v S*,[6] an appeal matter in which I sat:

‘It is implicit in our constitutional dispensation that all persons have inherent human dignity. This includes those who come before a court, be they witnesses or accused persons. Such persons are to be treated with dignity by a judicial officer. All are human beings and are entitled to be treated politely and respectfully.’ (footnotes omitted)

[12] To describe Mr Mtshali as being a liar and being the ‘worst of the worst’ was unjustified and intemperate. He was charged with shoplifting, not a crime against humanity. He had recognised the error of his ways and had not wasted the court’s time with a spurious plea of not guilty. A magistrate is endowed with considerable power in the exercise of his or her duties but should not see it fit to demonstrate that power by gratuitously insulting accused persons who have no means of replying to, or refuting, the comments made from the bench. It is redolent of a form of judicial bullying. This form of conduct is unbecoming of a civilised legal system, should not be permitted to take root and must be stopped now.

[13] In the circumstances, I would propose the following order:

4. If Mr Mtshali has not paid the fine initially imposed by the additional magistrate and has consequently been incarcerated for a period of six months, the Registrar of this court is directed to forthwith inform the Department of Correctional Services of the variation of the sentence.
5. A copy of this judgment is to be sent by the Registrar of this court to the magistrate of the Newcastle Magistrate’s Court for his consideration.

MOSSOP J

I agree:

E BEZUIDENHOUT J

[1] S 112(1)(a) of the Act reads as follows: ‘Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea -

- (a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and—
- (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or (ii) deal with the accused otherwise in accordance with law;’

[1] S 112(1)(a) of the Act reads as follows:

‘Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea -

- (a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and—
- (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or
- (ii) deal with the accused otherwise in accordance with law;’

[2] Section 302(1) of the Act reads as follows: ‘Any sentence imposed by a magistrate’s court - (i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191(2)(j) of the Children’s Act, 2005 (Act 32 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer; ... shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.’

[2] Section 302(1) of the Act reads as follows:

‘Any sentence imposed by a magistrate’s court - (i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191(2)(j) of the Children’s Act, 2005 (Act 32 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;

...

shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.’

[3] S v Gumede and others [2019] ZAKZPHC 70; 2020 (1) SACR 644 (KZP) para 41(e).

[4] Section 103(1) of the Firearms Control Act reads as follows: ‘(1) Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of –

- (a) the unlawful possession of a firearm or ammunition;
- (b) any crime or offence involving the unlawful use or handling of a firearm, whether the firearm was used or handled by that person or by another participant in that offence;

- (c) an offence regarding the failure to store firearms or ammunition in accordance with the requirements of this Act;
- (d) an offence involving the negligent handling or loss of a firearm while the firearm was in his or her possession or under his or her direct control;
- (e) an offence involving the handling of a firearm while under the influence of any substance which has an intoxicating or narcotic effect;
- (f) any other crime or offence in the commission of which a firearm was used, whether the firearm was used or handled by that person or by another participant in the offence;
- (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;
- (h) any other offence under or in terms of this Act in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
- (i) any offence involving physical or sexual abuse occurring in a domestic relationship as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998);
- (j) any offence involving the abuse of alcohol or drugs;
- (k) any offence involving dealing in drugs;
- (l) any offence in terms of the Domestic Violence Act, 1998 (Act 116 of 1998) in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
- (m) any offence in terms of the Explosives Act, 1956 (Act 26 of 1956), in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
- (n) any offence involving sabotage, terrorism, public violence, arson, intimidation, rape, kidnapping, or child stealing; or
- (o) any conspiracy, incitement or attempt to commit an offence referred to above.'

[4] Section 103(1) of the Firearms Control Act reads as follows:

'(1) Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of –

- (a) the unlawful possession of a firearm or ammunition;
- (b) any crime or offence involving the unlawful use or handling of a firearm, whether the firearm was used or handled by that person or by another participant in that offence;
- (c) an offence regarding the failure to store firearms or ammunition in accordance with the requirements of this Act;
- (d) an offence involving the negligent handling or loss of a firearm while the firearm was in his or her possession or under his or her direct control;

- (e) an offence involving the handling of a firearm while under the influence of any substance which has an intoxicating or narcotic effect;
 - (f) any other crime or offence in the commission of which a firearm was used, whether the firearm was used or handled by that person or by another participant in the offence;
 - (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;
 - (h) any other offence under or in terms of this Act in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
 - (i) any offence involving physical or sexual abuse occurring in a domestic relationship as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998);
 - (j) any offence involving the abuse of alcohol or drugs;
 - (k) any offence involving dealing in drugs;
 - (l) any offence in terms of the Domestic Violence Act, 1998 (Act 116 of 1998) in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
 - (m) any offence in terms of the Explosives Act, 1956 (Act 26 of 1956), in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
 - (n) any offence involving sabotage, terrorism, public violence, arson, intimidation, rape, kidnapping, or child stealing; or
 - (o) any conspiracy, incitement or attempt to commit an offence referred to above.’
- [5] The meaning of ‘makoti’ is ‘a bride; a newly-wed woman or a daughter-in-law; a term used by the family of a woman’s husband to refer to her.’ Online Dictionary of South African English: <https://dsae.co.za/entry/makoti/e04492>. A makoti traditionally does not make eye contact with someone addressing her and generally acts coyly.
- [6] Khuboni v S [2021] ZAKZPHC 73; 2022 (1) SACR 470 (KZP) para 25.

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