

SOUTH AFRICA / JUDGMENT

S v Ndaou (A292/15) [2015]

ZAGPPHC 274 (6 May 2015)

[2015] ZAGPPHC 274

COURT

North Gauteng High Court, Pretoria

BEFORE

E Bertelsmann, W Hughes

CASE / FILE NUMBER

A292/15

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH DIVISION, PRETORIA

High Court Reference No 216/15

Magistrate's Serial No: 12/2015

Date: 6 May 2015

Case number: A292/15

In the matter between:

THE STATE

and

KENNY NDAU.....Accused

REVIEW JUDGMENT

1. This matter has been placed before a judge in chambers for a special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 to review and correct the proceedings before the Bronkhorstspuit Magistrate's Court.
2. The accused, a 23 year old male, was charged with having contravened section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 by being in possession of "heroin aka nyaope". He pleaded guilty and was convicted and sentenced to 24 months imprisonment.

3. The accused was unrepresented. The presiding magistrate was therefore obliged to question the accused in terms of section 112 of the Criminal Procedure Act 51 of 1977 to establish whether the accused appreciated the implications of his guilty plea and, more particularly, whether he admitted all the elements of the offence he was charged with.
4. Several irregularities occurred in the proceedings that were conducted at break-neck speed:
 - a) In the first instance, heroine and nyaope are not identical, the latter being a combination of marijuana and heroine, a fact which is so notorious that a judicial officer in the criminal court could take judicial notice thereof. The charge sheet was therefore ambiguous and contradictory, nullifying a plea of guilty as it did not disclose the alleged offence properly;
 - b) Secondly, the magistrate asked only three perfunctory questions, including one: "Nyaope is an undesirable dependence producing substance?" It has been emphasized repeatedly that it is unfair to confront undefended and often barely literate accused with legal phrases and statutory definitions, which are not couched in ordinary language, and expect an informed response. In this respect the trial was clearly unfair;
 - c) There was no proof whatever that the substance allegedly found in the accused's possession was an undesirable dependence producing substance and the accused was not asked to explain his personal knowledge of the composition of the substance he was charged with being in possession of;
 - d) The sentencing proceedings were not transcribed. The accused was sentenced to imprisonment for 24 months. According to the documents in the case file he may have had a previous conviction for the same offence, but there is no indication on the record that he was confronted with his criminal record; albeit that a signature appears upon the SAP 69 form that might be the accused's;
 - e) As there is no record of the sentencing proceedings the trial magistrate's reasons for imposing a lengthy prison sentence are unknown. The magistrate has resigned and is no longer available to correct the record.
 - f) There is no indication on the record that the accused was informed that the matter was reviewable and that he had the right to make representations as part of this process. The fact that the magistrate omitted to note on the charge sheet that the matter was reviewable may indicate that he also failed to inform the accused of his right to participate in the review proceedings.
5. As the magistrate failed to ensure that the proceedings were reviewed, and as the clerk of the court did not send the matter on review of his or her own accord, the accused remained in jail without the irregular proceedings being subjected to further judicial scrutiny until a quality assurance assessment was conducted after January 2015 of the trial magistrate's cases. The Chief Magistrate for the district, Mr D. Nair, thereupon acted with commendable alacrity in ensuring that the matter was sent on special review to the High Court. Unfortunately, and for reasons that have remained unexplained, the record under his

covering letter dated the 10th April 2015 only reached the reviewing judge on the 4th May 2015.

6. After studying the record the reviewing judge ordered the accused's immediate release because of the above irregularities that lead to the accused receiving an unfair trial.
7. In the light of the above reasons, the following order must be made:
 1. The conviction and sentence are set aside.
 2. The accused is to be released from prison immediately.

Signed at Pretoria on this 5th day of May 2015.

E BERTELSMANN

Judge of the High Court

I agree

W. HUGHES

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