

SOUTH AFRICA / JUDGMENT

S v Tazira and Others - Review

(REV130/23)

[2023] ZALMPPHC 97 (16 October 2023)

[2023] ZALMPPHC 97

COURT

Limpopo High Court, Polokwane

BEFORE

M. Naude-Odendaal, C. Marais

CASE / FILE NUMBER

REV130/23

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IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: REV130/23

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

16/10/2023

THE

STATE

APPLICANT

and

LARMECK

TAZIRA

1st

RESPONDENT

ALPHA

TAZIRA

2nd

RESPONDENT

DANIEL

TAZIRA

3rd

RESPONDENT

REVIEW

JUDGMENT

NAUDE-ODENDAAL J:

[1] This is an automatic review from the Magistrate's Court for the District of Makhuduthamaga held at Nebo. The Respondents were charged as follows: -

(a) 1st Respondent (Accused 1 in the Court a quo - Larmeck Tazira):

Count 1 - Possession of Suspected Stolen Property in that the said Accused is guilty of the crime of contravening the provisions of Section 36 of the General Law Amendment Act, 62 of 1955 in that upon the 15th of August 2023 at or near R579 Brooklyn in the district of Makhuduthamaga, the Accused was wrongfully found in possession of goods, other than stock and produce as defined in Section 1 of Stock Theft Act, 57 of 1959, to wit:-

14 x electric cables

2 x steel ladders

2 x bolt cutters

in regard to which there is a reasonable suspicion that it was stolen, and is wrongfully and unlawfully unable to give a satisfactory account of such possession.

Count 4 - Immigration: Entering/remaining in the Republic at a place other than a port of entry.

In that the Accused is guilty of the crime of contravening the provisions of Section 9(1) read with Section 1 and 49(1)(a) of the Immigration Act 13 of 2002 as amended.

In that on or about 15 August 2023 and at or near R579 Brooklyn in the District of Mahuduthamaga, the Accused unlawfully and intentionally entered or remained from [in] the Republic at a place other than a port of entry by crossing the border illegally.

(b) 2nd Respondent (Accused 2 in the court a quo - Alpha Tazira):

Count 1 - Possession of Suspected Stolen Property in that the said Accused is guilty of the crime of contravening the provisions of Section 36 of the General Law Amendment Act, 62 of 1955 in that upon the 15th of August 2023 at or near R579 Brooklyn in the district of Makhuduthamaga, the Accused was wrongfully found in possession of goods, other than stock and produce as defined in Section 1 of Stock Theft Act, 57 of 1959, to wit:-

in regard to which there is a reasonable suspicion that it was stolen, and is wrongfully and unlawfully unable to give a satisfactory

account of such possession.

Count 3 - Immigration: Entering/remaining in the Republic at a place other than a port of entry.

In that on or about 15 August 2023 and at or near R579 Brooklyn in the District of Mahuduthamaga, the Accused unlawfully and intentionally

entered or remained from [in] the Republic at a place other than a port of entry by crossing the border illegally.

(c) 3rd Respondent (Accused 3 in the court a quo - Daniel Tazira):

Count 1 - Possession of Suspected Stolen Property in that the said Accused is guilty of the crime of contravening the provisions of Section 36 of the General Law Amendment Act, 62 of 1955 in that upon the 15th of August 2023 at or near R579 Brooklyn in the district of Makhuduthamaga, the Accused was wrongfully found in possession of goods, other than stock and produce as defined in Section 1 of Stock Theft Act, 57 of 1959, to wit:-

Count 2 - Immigration: Entering/remaining in the Republic at a place other than a port of entry.

In that on or about 15 August 2023 and at or near R579 Brooklyn in the District of Mahuduthamaga, the Accused unlawfully and intentionally

entered or remained from [in] the Republic at a place other than a port of entry by crossing the border illegally.

- [2] All three Respondents chose not to make use of legal representation and conducted their own defence.
- [3] Count 1 and Count 2, instead of Count 1 and Count 4, were put to the 1st Respondent and he was required to plead thereto. The 1st Respondent pleaded guilty to Count 1 and 2, despite having been charged in respect of Count 1 and Count 4. It should however be noted that Count 4 reads the same as Count 2.
- [4] The court a quo proceeded to question the 1st Respondent in terms of Section 112(1)(b) of the Criminal Procedure Act, 51 of 1977 in order to determine as to whether he admits all the elements of the charges leveled against him.
- [5] The court a quo consequently found the 1st Respondent guilty of Count 1 and Count 2, despite the 1st Respondent having been charged with Count 1 and Count 4.
- [6] The court a quo then proceeded to the 2nd Respondent. The 2nd Respondent was however only asked to plead to Count 1. The 2nd Respondent never pleaded to Count 3, despite the 2nd Respondent not having pleaded to Count 3, the court a quo however proceeded to question him on Count 3 and found him guilty thereof.
- [7] The court a quo then proceeded to the 3rd Respondent. The same situation ensued as in the instance of the 2nd Respondent. The 3rd Respondent was asked to plead to Count 1, but never pleaded to Count 2 as charged. The court a quo however then proceeded to find the 3rd Respondent guilty in respect of Count 4, despite not having been charged with Count 4, nor having pleaded to Count 4 either.

- [8] The court a quo then in sentencing the Respondents stated that for sentencing purposes, Count 1, Count 2, Count 3 and Count 4 will be taken as one for the purpose of sentence. None of the Respondents were charged or found guilty of all four counts, but each only of two respective counts. Each Respondent was consequently sentenced to twelve months imprisonment without the option of a fine.
- [9] After sentencing procedure, the Magistrate stated "the matter is reviewable", but failed to inform the Respondents of their Constitutional Rights in respect of Appeals and Reviews and the respective time frames within which the Respondents can lodge such an appeal or review. The court a quo then adjourned. At this juncture, I pause to mention, that except for informing the Respondents' of their Constitutional Right to be legally represented during the proceedings, the Magistrate failed to inform the Respondents of any of their other Constitutional Rights as required.
- [10] Section 105 of the Criminal Procedure Act, 51 of 1977, provides as follows:
- "105. Accused to plead to charge
- The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106."
- [11] In the present matter Sections 77, 85 and 105A had no application on the facts. It is clear, however, that Section 105 was not complied with in respect of the 2nd and 3rd Respondents in relation to Counts 2 and 3.
- [12] In *S v ZW2015 (2) SACR 483 (ECG)* at para. 41 stated as follows:-
- "The provisions of s 105 are peremptory, not only with respect to the stating of the charges in open court, but also particularly with respect to the party seized with the duty to do so, being the prosecutor who after all is the official representative of the state, being the accused's accuser. See *S v Mamase and Others 2010*
- (1) SACR 121 (SCA) para 7. Furthermore, an accused person is at the outset of criminal proceedings entitled to be advised of the case which he is called upon to answer to with sufficient particularity so as to instruct his legal representative properly and to plead to the charges in a meaningful way, should he so wish. The accused's right to be informed of the charge with sufficient detail to answer it is a fundamental non-derogable right which enjoys absolute protection in terms of s 35(3)(a) read with s 37(5)(c) of the Constitution."
- [13] The purpose of an accused being required to plead is that it gives the basis upon which he or she joins issue with the prosecution and affords the foundation on which the trial can commence. In the absence of a plea, there cannot be a valid trial; the case is not triable until the accused has pleaded, cf. *S v Mamase and Others 2010*

- (1) SACR 121 (SCA). Furthermore, and in any event, an accused person's fair trial rights would be vitiated if the hearing proceeded without him or her being informed of the charge(s) with sufficient detail to answer it (or them); s 35(3)(a) of the Constitution.
- [14] In addition, after the Respondents pleaded to Count 1, and in the instance of the 1st Respondent to Count 1 and Count 2, the trial magistrate should in the circumstances have asked the prosecutor whether the plea was accepted and then proceeded, by appropriate questioning of the accused, to confirm the plea, as provided for in s 112(1)(b) of the Criminal Procedure Act, 51 of 1977. That did not happen.
- [15] The Magistrate failed in applying the correct procedure in adjudicating the criminal trials, the Magistrate further failed to uphold and explain to the Respondents their Constitutional Rights and in essence a miscarriage of justice occurred and one could say the Respondents did not receive a fair trial. The misdirection by the Magistrate warrants this courts interference in the convictions and sentences imposed.
- [16] In the result this court makes the following order:-
1. The convictions and sentences of:
 - a. Accused 1 in respect of Count 1 and Count 2,
 - b. Accused 2 in respect of Count 1 and Count 3, and
 - c. Accused 3 in respect of Count 1 and Count 4are reviewed and set aside.
 2. The matter is referred back to the Magistrate's Court, Nebo, to be heard de novo before another Presiding Officer.

M. NAUDE-ODENDAAL

JUDGE OF THE HIGH COURT,

POLOKWANE

I AGREE:

C. MARAIS

ACTING JUDGE OF THE HIGH COURT,

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