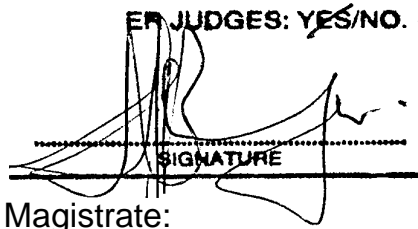


A358/05

THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

ER JUDGES: YES/NO.

 SIGNATURE

DATE: 24/03/05

Magistrate:

SEKGOSESE

Review Case no: B329\2004

High Court Ref no: 169

THE STATE V MAKORGETE LEFTY MOLEMA

REVIEW JUDGEMENT

SHONGWE]

- [1] In this matter the question is whether the magistrate complied with the provisions of Section 112 (i) (b) of the Criminal Procedures Act 51 of 1977 ("The Act"). Upon a plea of guilty a magistrate may, if satisfied that an accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty. This will be after questioning of the accused in order to ascertain whether he or she admits the allegations in the charge sheet.
- [2] The accused pleaded guilty to a charge of House breaking with intent to steal and theft. On his

plea he was convicted and sentenced to 2 years imprisonment. The matter was referred for automatic review. The Reviewing Judge raised certain questions, *inter alia*, whether the accused had the intention to steal when he broke the window pane and whether the sentence imposed was not too harsh.

- [3] The magistrate's response to the queries raised epitomizes a very negative attitude of a judicial officer not so interested in the magnitude of the issues involved. On the question whether the accused had the intention to steal his response is:

"Accused admit to have broken into this house and steal, the cell phone. He did nothing further to suggest that his intention was to steal" [Sic] (There is probably a typographical error between the words 'was' and 'to' I believe the word "not" was omitted)

- [4] During the hearing the following questions were, *inter alia*, asked:

"Court: Do you admit to have entered in this house and stole the properties mentioned in the charge sheet? [Sic]

"Accused 2: Yes your Worship"

"Court: How did you gain entry?"

"Accused 2: I broke the window pane and opened the door and entered your Worship".

"Court: Yes"

"Accused 2: Nothing further."

"Court: Ja, you broke the window pane, opened the door and entered and what happened?"

"Accused 2: I took the cell phone."

"Court: What else did you take?"

"Accused 2: Nothing"

"Court: Where were you taking the cellular phone to?"

"Accused 2: I was just taking it your Worship as I went there with another boy your Worship who said that he has a girlfriend at that particular homestead your Worship, but as they did not want to open for us your Worship I decided to break to window pane to enter."

- [5] No further questions were asked by the magistrate, based on the above questioning the accused was convicted of House breaking with intent to steal and theft. It is significant for a presiding officer to satisfy himself-herself whether

the accused knew that his conduct was wrongful and punishable by law. In the present case the magistrate failed to properly interrogate and canvass the intention of the accused as well as whether the accused was aware of the wrongfulness of his action.

[6] It is well settled that Section 112 (i) (b) was designed to protect an accused from the consequences of an unjustified plea of guilty and therefore courts are expected to apply the provisions thereof with care and circumspection. The answers provided by the accused leave room for a reasonable explanation other than his guilt. It is my strong view that a plea of not guilty should be entered in terms of Section 113 of the Act, to enable the state and the accused, if he so wishes, to lead evidence in clarification (See *S vs Naidoo*: 1989 (2) SA 114 at 121 E et seq)

[7] The *raison d'etre* of Section 112 (i) (b) is to verify whether the accused, indeed, admits all the elements of the charge and also to satisfy the presiding officer of the guilt of the accused.

[8] In the light of my attitude to the conviction as such, I do not consider it necessary to delve into the question of the appropriateness of the sentence. Suffice it to mention that the sentence

is shockingly inappropriate in the circumstances. The presiding officer ignored the fact that the cell phone had been returned to the owner and that the window pane had been repaired by the accused and most of all he is a first offender.

[9] Consequently I make the following order:

- (a) The conviction and sentence are set aside.**
- (b) The case is remitted to the magistrate who convicted and sentenced the accused.**
- (c) The magistrate is directed to record a plea of not guilty and to require the prosecutor to proceed with the prosecution.**

**J B SHONGWE
JUDGE OF THE HIGH COURT**

**L O BOSIELO
JUDGE OF THE HIGH COURT**