

A145/18 ✓✓

Date: 11/04/2018

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA



DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.

Case Number: 362/2017

DATE

SIGNATURE

In the matter between:

THE STATE

and

THUSO NYEMBEZI

Coram: PHAHLANE AJ

REVIEW JUDGEMENT

PHAHLANE AJ

[1] The Accused stood arraigned in the Magistrate's court for the district of Merafong, held at Oberholzer on a charge of being in possession and/or use of an undesirable dependence substance, which is in contravention of section 4 (B) of Act 14 of 1992.

- [2] He is alleged to have been in possession of a syringe with traces of heroin on the 4th of June 2017.
- [3] The accused was not legally represented during the trial and he pleaded guilty to the charge in terms of section 112 (1)(b) of the Criminal Procedure Act 51 of 1977 (the Act) on 1 November 2017. No proper enquiry was made by the presiding officer to confirm whether accused had pleaded guilty to all the elements of the charge put to him.
- [4] It appears on record that the only enquiry made by the Learned Magistrate was:
1. whether accused wanted to conduct his own defence;
 2. whether accused understood the charges against him
 3. whether there was heroin in the syringe,
 4. whether accused knew that it was unlawful to possess such; and
 5. whether accused was in possession of it because he was smoking it – the answer to which was [indistinct] as it appears on record.
- [5] The accused was therefore found guilty and sentenced to one-year imprisonment. It appears from the record that the accused was apparently serving a three-year imprisonment sentence which was imposed on him on 4 September 2017 on a charge of theft. The Learned Magistrate ordered that the accused should start serving his one-year sentence after serving the three-year imprisonment sentence. No reasons were given for making such an order and accused was declared unfit to possess a firearm.

[6] On 23 November 2017 I received the file in which I raised some queries addressed to the magistrate, Mr N.P. Seopela who was the presiding officer during the trial. On 20 March 2018 I received the reasons which forms the basis of this judgment. The background facts relating to the offence itself are unknown as they do not appear in the indictment, save to say that accused was found to be in possession of a syringe containing traces of heroin.

[7] The queries raised with the Learned Magistrate were related to:

1. Why the accused's rights in terms of section 35(3)(h) and (j) of the Constitution were not explained as they do not appear from the record.
2. Why the accused was informed of an enquiry in terms of section 102 of the Criminal Procedure Act 51 of 1977, as it does not relate to the charges put to the accused
3. There was no proof that the substance found in the syringe was taken to Forensic Laboratory to be tested to ascertain if it was indeed heroin.
4. Whether the quantity of the substance was verified to ascertain if it was against the provisions of section 4(b) of Act 104 of 1992
5. Why the accused was convicted without verifying if the substance found on him was heroin [or a dangerous dependence producing substance as defined in section 4(b) of Act 140 of 1992
6. Whether the element of *intention* was proven
7. Why the Learned Magistrate made an order that the accused is to start serving his sentence after the 3-year term which the accused is currently serving as well as the basis of this finding?

- [8] With regards to the first query raised, the magistrate responded in the affirmative stating that the explanation of the right appears in the explanation of court to the accused during plea explanation in terms of section 112(1)(b) of the Criminal Procedure Act. He further explained that on the 30/10/2017 during accused first appearance, accused's rights to legal representations were explained and accused elected to conduct his own defence. Further that the court asked accused again on the 1/11/2017 whether he still elects to conduct his own defence and he answered in the affirmative.
- [9] In terms of section 112(1)(b) of the Act, an inquiry is to be conducted by the presiding officer where an accused pleads guilty to an offence charged, if the offence is punishable by imprisonment or any form of detention without an option of a fine; or, if the fine to be imposed exceeds the amount determined by the Minister from time to time in the Gazette or if the presiding officer is requested by the prosecutor to question the accused with reference to the alleged facts of the case, in order to ascertain whether the accused admits to the allegations in the charge to which he has pleaded guilty.
- [10] In my view, this issue was not dealt with accordingly or dealt with at all as it does not appear on the record. It is clear from the record that the accused was made aware that he has to admit to all the elements of the charge and the effect of not complying with those elements.
- [11] The presiding officer *in casu* having failed to comply with the requirements of section 112(1)(b) and the accused was found guilty in the face of the aforesaid non-compliance.

[12] With regards to the second query raised, the magistrate responded that the inquiry in terms of section 102 was of Act 51 of 1977 is not applicable and that it was an error on his part to inform the accused of the said inquiry. With regard to queries four and five, the magistrate responded that it was an error on his part not to ask for proof of the quantity and verification of the substance. Responding to query number six, the magistrate responded that the answers given by accused on the question by the court were enough for the court to convict the accused for possession of heroin without giving reasons for conviction. He explains that he was satisfied that the answers of the accused admitted all elements of the offence of possession of heroin and that he was of the view that the explanation of the accused that he wanted to smoke it is sufficient to make a conclusion that he had the intention to possess the heroin. Responding to the last query, the Learned Magistrate stated that it was an error on his part, It was not necessary to make such an order.

[13] What is paramount in such circumstances is whether the accused received justice. It is my view that unfortunately, the trial Court did not satisfy itself that there was evidence to prove that the substance to which the accused has been charged and convicted of was indeed heroin. Most importantly, the accused's rights not to incriminate himself; to remain silent; and to have legal representation were not explained by the court.

[14] I am of the view that the proceedings herein stand to be set aside because the accused did not receive a fair trial and it was not in the interest of justice to convict and sentence an accused where there was no proof beyond a reasonable doubt that

the accused was in fact in possession of a dangerous dependence producing substance as defined in section 4 (b) of Act 140 of 1992.

[15] Consequently, the proceedings before the trial court are to be set aside.

In the circumstances, I propose the following order be made:

1. The proceedings of the trial court are set aside.
2. The conviction and sentence are set aside.

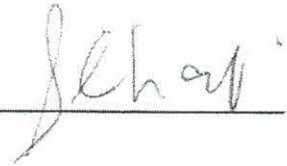


P. PHAHLANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree.



V. V. TLHAPI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA