Review case no: 171201/17

George Regional Court no. R140/17

In the matter between:

THE STATE

v

OMESHA RAMATAR

Coram: Sher *et* Henney JJ

JUDGMENT (ON REVIEW) DELIVERED ON 30 MAY 2018

SHER, J:

1. This matter is before us on automatic review. The accused pleaded guilty before the Regional Magistrate of George to a charge of theft of razor blades to the value of about R850. Although he was only 28 years old at the time he had a number of previous convictions, including 4 for theft and 4 for robbery for which he had been sentenced to varying terms of imprisonment. The offence in question was committed only a few months after he had been released after serving a sentence of 3 years for robbery.

2. Because of his long list of previous convictions the magistrate was of the view that a further custodial sentence was unavoidable and she accordingly sentenced the accused to 24 months imprisonment. But as he had a long-standing drug problem which required treatment the magistrate ordered that the sentence should be served in terms of the provisions of s 276(1)(i) of the Criminal Procedure Act[1], which would allow the Commissioner of Correctional Services to discharge him once he was satisfied that he had complied with the relevant treatment programs which he would be required to undergo whilst in prison.

3. On the face of it the sentence which the magistrate imposed was fair and appropriate and the proceedings appeared to be in order at least insofar as noting of the requisite elements of the offence was concerned, during questioning in respect of the plea in terms of s 112(1)(b) of the Act.

4. However, when the magistrate's notes were compared with the transcript of the recording of the plea proceedings it appeared that a gross irregularity might have occurred. In this regard it was apparent from the transcript that at the inception of proceedings and immediately after the accused indicated that he wished to plead guilty the magistrate asked the prosecutor whether the accused had "*pleas*" (sic) because, she said, if the accused was so eager to plead (guilty) "*you must know*". If one has regard for the prosecutor's response this appears to be a phonetic error in the transcription and what the magistrate actually asked was how many "*pc's*" ie previous convictions the accused had, because the prosecutor informed her that there was "*one previous robbery incident, the other one was withdrawn*". Apparently not satisfied with this response the magistrate then asked the accused directly whether he only had one previous conviction to which he replied, quite candidly, that he had more, whereupon the magistrate then proceeded to take his guilty plea and to convict him.

5. Given that it appeared as if the magistrate sought to elicit information pertaining to the accused's criminal record prior to conviction she was asked to provide reasons for her conduct together with her comments if any, in regard to why the

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[1] Act 51 of 1977.

proceedings should not be set aside on the grounds of a failure of justice due to a material irregularity. In this regard s 211 of the Criminal Procedure Act[2] provides that evidence of previous convictions shall not be admissible prior to conviction in a criminal trial, except where otherwise expressly provided for in the Act, or where the fact of a previous conviction is an element of the offence with which the accused has been charged. And s 197 expressly provides not only that an accused shall not be asked whether he has previous convictions, but he may not even be asked any questions which tend to show that he has previously committed or has been charged with any offence other than the offence with which he has been charged.

6. In her reply the magistrate said that it was 'normal' in minor shoplifting matters for the state prosecutor to withdraw the charge and to divert the matter. The magistrate said that given the accused's insistence on pleading guilty to the charge of theft of goods which had a relatively minor value the court had 'actually' wanted to know if the matter could be diverted and she should have asked if the accused did not qualify for diversion but, according to her, the prosecutor inadvertently proceeded to divulge one of the accused's prior convictions.

7. According to the magistrate, as the accused proceeded to tender a guilty plea in which he admitted all the requisite elements of the offence and as no credibility findings had to be made the information which was elicited concerning the accused's criminal record played no role in the guilty 'verdict' and the court was not influenced by it. The magistrate also said that when the accused's record was produced it appeared that he had numerous previous convictions- a fact which the court did not know beforehand. In the circumstances the magistrate was of the view that the conviction was in order.

8. In *Dzukuda*[3] the Constitutional Court reminded us that at the heart of the right to a fair criminal trial and what infuses its purpose is for justice to be done and to be seen to be done. To this end a judicial officer must conduct a criminal trial in such

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[2] Act 51 of 1977.

[3] *S v Dzukuda & Ors; S v Tshilo* 2000 (2) SACR 443 (CC) at para [11].

a manner that her open-mindedness, impartiality and fairness are manifest to all concerned, especially the accused.[4] Impartiality, it has been said, is the 'cornerstone' of a fair and just legal system and nothing is more likely to impede confidence in judicial proceedings than actual bias, or the appearance thereof.[5] It is important that the public should have confidence in the courts and the system of criminal justice for upon this 'social order and security' depend.[6] Confidence allows for trust to develop, which ultimately results in respect for the system and moral authority for the courts which are required to administer it. Unfortunately, trust and respect are easily eroded unless there is a persistent and scrupulous adherence to the fundamental requirement of impartiality.

9. Justice cannot be seen to be done when a presiding officer is partial and in this regard it is well settled that not only actual bias but even the objective appearance or 'reasonable apprehension' thereof (as it is more properly referred to) may vitiate the proceedings, rendering them a nullity.[7]

10. A presiding officer should consequently refrain, at all times, from questioning an accused in such a manner or to such an extent as may convey an impression that he/she is biased or partial, or that he/she is precluded from objectively adjudicating upon the issues before him/her.[8] Where there is a transgression of these limitations, which might prejudice an accused, it will constitute an irregularity which results in a failure of justice.[9]

11. Appellate courts have not hesitated to set aside criminal proceedings where a presiding officer has exceeded the bounds of permissible questioning of an accused both generally[10] as well as in terms of s 112 (1)(b).[11]

12. The section provides that where an accused pleads guilty to a charge and the prosecutor accepts the plea the presiding officer shall question the accused with

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4 *S v Rall* 1982 (1) SA 828 (AD) at 831H-832A; *S v Mlimo* 2008 (2) SACR 48 (SCA) at para [10].

5 *SACCAWU & Ors* v *Irvin & Johnson Ltd* 2000 (3) SA 705 (CC) at para [13].

6 *S v Le Grange & Ors* 2009 (2) SA 434 (SCA) at para [21]; referred to with approval in *Mulaudzi v Old Mutual Life Inc Co (SA) Ltd & Ors, NDPP & Ano v Mulaudzi* 2017 (6) SA 90 (SCA) at para [47].

7 *S v Roberts* 1999 (2) SACR 243 (SCA) at para [26]; *S v Le Grange & Ors* 2009 () SA 434 (SCA) at para [13].

8 *Rall* n 4 at 832B-C.

9 *Id* at 832H-833A.

10 *Rall* n 4; *Le Grange* n 6; *S v Tyabela* 1989 (2) SA 22 (A); *S v Maseko* 1990 (1) SACR 107 (A*); S v Aspeling* 1998 (1) SACR 561 (C).

11 *S v Williams* 2008 (1) SACR 65 (C).

reference to the alleged facts of the case in order to ascertain whether or not he admits the allegations in the charge to which he has pleaded and, if satisfied that he is guilty of the offence, may then convict him on the basis of his plea without any evidence being tendered.

13. The purpose of the questioning which the magistrate is required to carry out is to determine if the accused has committed the offence with which he has been charged, unlawfully and with the necessary *mens rea*[12] and it has been held that the provision is designed to protect an accused, especially one who is unrepresented, from the adverse consequences of an ill-considered plea of guilty.[13]

14. As such, on this ground alone the magistrate's questions were irregular as they were not directed at satisfying the requirements of the section and had nothing to do with either the facts relevant to the underlying allegations in the charge-sheet, or the accused's state of mind and knowledge of unlawfulness in relation to the charge. And the magistrate's explanation for what occurred does not hold any water and is disingenuous. If the magistrate thought that this was potentially a matter for diversion, then she could and should quite simply have enquired whether this was so, from the prosecutor. Instead she directed questions to the prosecutor and the accused in which she sought directly to elicit his criminal record, even before she had taken his plea. And the reason why she did so is patently because she assumed, simply because the accused was eager to plead guilty, that he must have had a criminal record. That alone indicates the biased lens through which the magistrate viewed the accused. It is highly disconcerting that when faced with the transcript of what actually occurred, instead of owning up to her improper conduct the magistrate sought not only to provide an explanation which was untenable and which is not borne out by the transcript but sought to place the blame on the prosecutor.

15. It is so that the prosecutor should not have revealed that the accused had a criminal record and should instead have reminded the magistrate of the

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[12] *S v Nyanga* 2004 (1) SACR 198 (C) 201b-e.

[13] *S v Baron* 1978 (2) SA 510 (C) at 512F-G; *S v Samuels* 2016 (2) SACR 298 (WCC) at para [21].

provisions of ss 211 and 197, but the reality is probably that because the prosecutor stood in a subordinate position to the court, he/she felt obliged to answer the court's questions directly and truthfully. But it was the primary duty of the presiding officer to direct and to exercise control over the proceedings in such a manner as to ensure that they were conducted with due regard for the principle of impartiality and the provisions of the Act. In the circumstances one would have expected that the magistrate would have had the courage and sense of responsibility to admit to having erred instead of seeking to shift blame elsewhere and then aggravating matters by putting forward an explanation which was untrue. In this regard the further statement which the magistrate made that it was only when the accused's record was produced that she became aware that he had more than one previous conviction is also not borne out by the transcript. As we have previously pointed out, already before taking his plea the magistrate knew that the accused had more than one previous conviction.

16. Any right-minded and reasonable observer who might have been in court at the time could not have helped but to have grave doubts as to whether or not the magistrate would give the accused a fair deal, given that she had elicited his criminal record even before she took his plea, and they would have had a reasonable apprehension of possible bias on the part of the magistrate. That was enough to destroy the confidence which was necessary for the proceedings to enjoy the requisite credibility and legitimacy they should have had. The impression that the magistrate was biased would have been further reinforced by the fact that even though following upon the accused's conviction the prosecutor indicated that the state was not intent on proving any previous convictions, the magistrate nonetheless insisted that she wanted the accused's 'priors' as he did not only have a previous conviction for robbery but had 'others'.

17. In the circumstances the fact that the accused was properly convicted in accordance with the admissions he made in his plea and was fairly sentenced thereafter does not mean that one can and should ignore the fundamental unfairness that preceded this. Our law does not countenance a 'no difference' argument to this kind of material irregularity, as contended for by the magistrate.

The accused's constitutional right to a fair trial was breached and the proceedings were vitiated on the grounds of a failure of justice as a result of the magistrate's apparent bias.

18. In *Le Grange*[14] the Supreme Court of Appeal held[15] that where the proceedings in a criminal trial are vitiated by bias there remains neither a conviction nor an acquittal on the merits and in terms of s 324 of the Act the accused can thus be retried. Whether or not there should be a re-prosecution is a matter for the determination of the Director of Public Prosecutions who will, when exercising his discretion, have regard for the public interest and the interests of justice as well the accused's circumstances including the time served by the accused.

19. We are also of the view that the magistrate's conduct, both at the time when the plea was taken as well as in response to the request for reasons, should be referred to the Magistrate's Commission and the Regional Court President, for their consideration.

20. The following Order is made:

    1. The conviction and sentence imposed in the matter before the Regional Magistrate of George under case no. R 140/17 are set aside.
    2. A copy of this judgment is to be sent together with a copy of the record in the matter under case no. R 140/17 to the Director of Public Prosecutions, Western Cape, as well as the Magistrates' Commission and the Regional Court President.

SHER J

I agree.

HENNEY J

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[14] Note 6.

[15] Paras [30]-[31] relying on *S v Naidoo* 1962 (4) SA 348 (A) at 354D-F.