Reportable:
Of Interest to other Judges:
Circulate to Magistrates:

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Review No.: 102/2015

In the review matter between:

THE STATE

and

NOMVULA LINAH TSHABALALA

CORAM: MOCUMIE, J et OPPERMAN, AJ

DELIVERED: 05 MAY 2016

The Court.

[1] The accused was convicted of theft by the Magistrate's Court, Witsieshoek, Phuthaditjaba, Free State on 26 January 2015. The conviction followed after a plea of guilty in terms of s 112(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA). She was sentenced as follows:

'Fined one thousand five hundred rands (R1500.00) or in default of payment to undergo three (3) months imprisonment. In terms of the Firearms Control Act accused is determined fit to possess a firearm (Section 103(2) of Firearms Control Act 60 of 2000)'

[2] On 10 June 2015[1], when this court received this matter on review; it was under covering letter dated 14 April 2015[2] which reads:

'I forward herewith the record and J4 for review.

The accused was charged with theft and she pleaded guilty and the plea was accepted by the State in terms of Section 112(1)(a) of Act 51 of 1977 and the accused was convicted.

The Prosecutor who accepted the plea in terms of section 112(1)(a) then proved previous convictions and asked for direct imprisonment.

I am forwarding the record of proceedings in order for the reviewing Judge to see whether the proceedings were in accordance with justice.

The delay in submitting is regretted since there is no co-operation with the support services and it is beyond my control.

Regards'

[3] On 19 June 2015 the review was sent back to the magistrate with queries. The request was apparently received by the magistrate on 29 August 2015. It consisted of the following:

'1. It took 5 months for this matter to be sent on review contrary to the clear provision of s 302 of Act 51 of 1977. The magistrate's explanation is not clear. What is meant by 'no co-operation with the support services'?

2. Is section 112(1)(a) the appropriate procedure to have adopted in the circumstances of this case? The accused was unrepresented; the Prosecutor was aware that she has previous convictions of theft and even asked for direct imprisonment. Refer to recent decided cases.

   1. Is the sentence appropriate considering that the accused is what can be safely called a serial thief?
   2. What are the reasons for imposing this type of sentence? Refer to decided cases.'

[4] On 20 October 2015 a reply to the query dated 9 October 2015[3] was received. The reasons provided read as follows:

[1] Five months after finalisation of the case and two months after the date of the covering letter.
[2] Three months after the finalisation of the case.
[3] Four months after the request for reasons.

'The matter is referred to the Honourable Reviewing Judge *as a special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 because the Public Prosecutor applied for a sentence of direct imprisonment after having accepted the plea in terms of section 112(1)(a) of Act 51 of 1977.* With reference to "no co-operation with support services"- the trial court meant that it took some time to have the record transcribed and such delay is regretted and will be avoided in future. (Accentuation added)

1. The trial court understands fully the concerns of the Honourable Reviewing Judge regarding Section 112(1)(a) bearing in mind that it does not say anything about the period of imprisonment except the fine which must not exceed the amount determined by the Minister from time to time in the Gazette. The judgments in the case of State v Modumela and others [2015] JOL 33147 (FB) and State v Kholoane 2012(1) SACR 8 (FB) are noted.
2. After considering the decided cases, it appears that the trial court treated the accused person with kid gloves but the accused had shown remorse which was translated into action by pleading guilty- S v Brand 1998(1) SACR 296 (C)-if the accused shows genuine remorse, punishment will be accommodating, especially when the accused has taken steps to translate his or her remorse into action.
3. Sentence in respect of a plea in terms of section 112(1)(a) must be a fine with an alternative term. Accused addressed in mitigation of sentence, it transpired that she was a primary caregiver to her two minor children who were 1 year and 10 months and 10 months old respectively and the relationship with her in laws was not healthy.

It is further submitted that the Public Prosecutor accepted the plea in terms of section 112(1)(a) of Act 51 of 1977 which made the offence a minor offence taking into account that the stolen items amounted to R195-87 although she well knew the previous convictions and thereafter addressing court and applying for direct imprisonment and that is was prompted the trial court to refer the matter for special review.

In future the court will adopt the provisions of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 to avoid a recurrence of this nature.

Thank you My Lady.' (Accentuation added)

[5] A particularly thorough reading of the case raises numerous issues of concern which are at first blush not evident. These are:

a) The administration of the referral of review cases by the Magistrate Court to the High Court,
b) the delay in the reply to the queries by the High Court,
c) the standard of the reply to the said queries and
d) the erroneous application of the law.

<u>The administration of the referral of review cases by the Magistrate Court to the High</u> Court

[6] After some cursive research we came to the conclusion that there are no guidelines in the Magistrate's Courts across the country on the administration of the referral of review cases to the High Court and importantly on who must send a special review to the High Court under s304 read with s303 of the CPA.

[7] But, the practice is and has always been, the Chief Magistrate or the Senior Magistrate assigned to do so, the Quality Assurance Officer alternatively a Magistrate who is based at a station where (s)he serves as Head of Office. When a magistrate discovers that (s)he has made a mistake that can only be corrected by the High Court in line with the long standing principle of *functus officio,* (s)he must bring such mistake or oversight to the attention of the Chief Magistrate or the designated Senior Magistrate. One of the two will send the review under his or her covering letter. The covering letter will identify the problem and propose a remedy or seek direction/guidance on how the matter should be dealt with; but definitely not the magistrate that made the mistake in the first place. Of late this practice is not adhered to by magistrates in the Free State, both cluster A and B.[4]

[8] The rationale behind this practice is and has always been to avoid a situation where the magistrate that has committed the mistake by oversight or lack of

[4]Cluster A covers Bloemfontein and neighbouring towns. Cluster B covers Welkom and neighbouring towns.

appreciation of the wrongfulness of his or her judgment, conceals such conduct to the prejudice of the accused. This case is a stark reminder of the importance and relevance of the system of review in the country.

[9] The history of the system of review and its critical importance is captured succinctly in *S v Mafikokoane; S v Mokhuane*[5] where the court stated:

'One of the important contributions made by South African law to the administration of justice is the system of review as of course, or, as it is more commonly known, of automatic review. The system requires that every conviction and sentence of an inferior court falling within certain categories be confirmed by a Judge of the Supreme Court, and each case is reviewed without any application by the accused person.'

The delay in the reply to the queries and the standard of the reply to the High Court

[10] We are not going to burden this judgment with details on the delays in the response to the queries and the standard of the reasons supplied. The documents and the facts are self-evidentiary. Suffice to state that this is not how to respond to queries from the High Court. In this instance, sending a matter first under s303 and then s304 of the CPA. The inordinate delay of more than five months all amounted to unnecessary and seriously prejudicial delay to the accused person.

[11] We cannot emphasise enough. Where a matter has been sent on review to the High Court and such court requests a magistrate to furnish reasons for the conviction or sentence, the magistrate should regard such request as one of an extremely urgent nature. The clerk of the court is also duty bound not to fail to comply with the requirements of s 303 of the CPA.[6]

'The clerk of the court in question *shall within one week after the determination of* a case referred to in paragraph (a) of section 302(1) forward to the registrar of the provincial or local division having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish to append thereto, and with any written statement

[5] S v Mafikokoane; S v Mokhuane 1991 (1) SACR 597 (0).
[6] See S v Letsin 1963 (1) SA 60 (0) at 61A-H.

or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as possible, lay the same in chambers before a judge of that division for his consideration." (Accentuation added)

[12] Reviews are urgent in nature. Although the CPA does not explicitly attach any consequence to non-compliance to the 'one week', any delay has the potential to cause prejudice and an irreversible collapse of justice. In *S v Lewies*[7] the court stated that the whole purpose of s303 is to ensure a fair trial for the accused person. One of the essential elements is the expedition of matters and the finalisation thereof. Section 303 is peremptory.[8]

[13] In *S v Nyumbeka* [9] the Full Bench of the Western Cape took pains to reiterate the role of a magistrate when imposing a reviewable sentence. At para [21] the court stated:

'[21] When imposing a reviewable sentence, magistrates should check:

(i) That it had been entered into the review register;

(ii) that the full record had been properly typed, where it had been handwritten, and transcribed, where there was a mechanical recording of the proceedings;

(iii) that all the evidence presented at the trial is included and, where it is not available, try and reconstruct such evidence from the handwritten notes, with the assistance of all the parties concerned;

(iv) that all documents and annexures are attached to the record;

(v) that no incomplete or incorrect record is sent on review, because this would lead to delays, as has happened in this matter. Should this happen, the magistrate would be clearly negligent in executing his/her duties and functions imposed by the law, especially s303 of the Criminal Procedure Act 51 of 1977."

At para [22] it explained further:

[7] S v Lewies 1998 (1) SACR 101 (CPA) at 104.

[8] See also S v Mofokeng 1974 (1) SA 271 (0), Sv Mafikokoane; S v Mokhuane 1991 (1) SACR 597 (0), S v Letsin 1963 (1) SA 60 (0), S v Raphatle 1995 (2) SACR 452 (T).

[9] S v Nyumbeka 2012 (2) SACR 367 (WCC).

> '[22] Whilst the preparation of a record for a review and an appeal is primarily a function of the clerk of the court, it is ultimately the function of the magistrate to see to it that a proper record is sent to the high court. The clerk of the court, unlike the one in this case, should see to it that this is done timeously and within the periods prescribed by law, and should follow up after having checked the register, as to why reviews are delayed. Here they have also clearly failed in their duty, in terms of s 165(4) of the Constitution, to give effect to an order of court.'

[14] In this case, the accused person was sentenced on 26 January 2015. There is no indication that she was informed of the provisions of s303 of the CPA. The record was signed by the magistrate presiding on the same day. The record only reached this court five months outside the prescribed period of seven day; a week. A query was sent on the same day requesting reasons for such delay. This query was only responded to four months later. This means the matter could only be addressed by this court after eight months had lapsed. By that time the accused person had already served the three months imprisonment i.e Even before this court could confirm that the proceedings were in accordance with justice. Fortunately, considering her long list of previous convictions, the accused suffered no prejudice. If anything she benefitted from this miscarriage of justice.

<u>The erroneous application of the law</u>

[15] Apart from the above, the crux of this review is the application of s 112(1) (a) of the CPA and the remedy the presiding officer has at his or her disposal when (s) he realises the incorrectness of a conviction. The solution, as will be apparent later, is not, as it happened in this case, to impose an inappropriate sentence.

[16] As is evident from the record, the accused person pleaded guilty on theft. The record goes to show the following interaction between the prosecutor and the magistrate as well as the accused person.[10] State prosecutor puts the charge

[10] Page 329 of the transcribed record.

to the accused person. She pleads guilty to the charge. The magistrate then states: 'Ms Maponya'. apparently asking the prosecutor whether she was accepting the plea as tendered and the prosecutor responded: 'the State accepts the plea in terms of s112 (1) (a) your Worship'. The magistrate then summarily informed the accused person that 'The State accepted the plea in terms of s112 (1)(a) of the Criminal Procedure Act 51/1977 and the accused is found guilty of theft...'

[17] The prosecutor at this stage presented a long list of previous convictions which the accused person admitted. An altercation then ensued between the magistrate and the prosecutor when the magistrate realised the predicament in law; i.e that she could not have applied section 112(1)(a) in the light of the facts that have since come to light. She appears at this stage to have realised that a harsher sentence than is permitted in section 112(1)(a) must be imposed.

[18] *S v Modumela and Others*[11] underscores the role of the prosecutor in the determination of which subsection should be applied in similar circumstances. In the judgment the court stated:

'[W]hilst on this point, it is apt to make reference to *S v Onesmus; S v Amukoto; S v Mweshipange 2011 (2) NR 461 (HG) at paragraph [17] Liebenberg J* dealt with a remarkably similar conduct of a Prosecutor in the following terms:

'What I find most surprising and conflicting is that although the prosecutor held the view that these cases could be finalised in terms of section 112(1)(a) – thereby implying that they was minor offences – he, when addressing the Court on sentence, submitted that the offences were of serious nature. What boggles the mind is, how can the same offence at the stage of pleading be considered to fall in the category of crimes classified as 'minor offences', but when it comes to sentence, the same offence (on the very same facts), is elevated to a 'serious crime'? Prosecutors are reminded that they are officers of the Court; and as such under a duty to serve the interests of justice. Had the prosecutor representing the State in these cases been serious, then he would not have intimated to the Court to invoke the provisions of section 112(1)(a); but instead, would have insisted that section 112(1)(b) be applied, where the Court was obliged to do so in terms of the Act . . .'

[11] S v Modumela and Others [2015] JOL 33147 (FB).

[19] The message from these cases is simple: First; s 112(1)(a) cannot be invoked where the offence is not of a trivial nature. Taking into account the far reaching consequences of theft out of supermarkets or cash and carry stores as in this case; including loss of employment for the employees of those stores, it can never be regarded as trivial. Second; imprisonment may not follow a conviction after the application of s 112(1)(a).

[20] Perhaps it is more apposite at this juncture to quote the most recent judgment of this court, *S v Mohata* [12] where this court echoes what is set out above categorically:

'[9] ... section 112(1)(a) should be used only for minor offences. It is almost in the nature of an acknowledgement of guilt fine. The accused should, it can almost be said, stand with the money, ready to pay the fine or qualify for a deferred fine. Magistrates should rather, in appropriate cases, consider using section 112(1)(b) and ask a few simple questions to make sure of the guilt of the accused. Then sentencing becomes much simpler.'

[21] Coming back to the facts of this case, at the time the prosecutor informed the magistrate that she accepted the plea as tendered, the magistrate could not have known better but to rely on the prosecutor. However, once she became aware of the accused person's long lists of previous convictions, the seriousness of the offence and that the accused deserves a harsher sentence than permissible under section 112(1)(a) she should not have proceeded as if she had no remedy to cure the defective process that she embarked upon as the proceedings were clearly not in accordance with justice. The solution lied and still lies in s304A of the CPA.

[22] Section 304A of the CPA states:

'1(a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the

[12] S v Mohata [2015] JOL 33312 (FB) paragraph [9].

reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303.'

(b) When a magistrate or a regional magistrate acts in terms of paragraph (a), he shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings and, if the accused is in custody, the magistrate or regional magistrate may make such order with regard to the detention or release of the accused as he may deem fit.'

[23] In conclusion, the conviction is not in accordance to justice and the sentence that followed, is also legally inappropriate. A sentence cannot follow on an illegal conviction and the sentence in itself does not serve the interest of justice.

[24] It would be remiss of us if we do not touch on the type of sentence the trial court imposed. The accused has previous convictions of theft which cover one and half pages. The SAP 69 from the Criminal Record Bureau handed in reflects that she has been convicted of theft repetitively since 11 June 2008 until 13 January 2014. Between the two dates the sentences imposed ranged between fines coupled with terms of imprisonment between 30 and 60 days imprisonment with the last, on 13 January 2014, being a caution and discharge; which qualified her as a serial thief. Yet, on 12 January 2015, on her seventh conviction of theft, the magistrate deemed it appropriate; without advancing any reasons; to impose a fine of R1500 or 3 months imprisonment.

[25] We will not go into the importance of giving reasons even at sentencing stage in all cases, suffice to reiterate that much effort and time should be invested at sentencing stage just as during the determination of the merits of the case in order to reach a just sentence; which is balanced and also satisfies the needs of society. No right thinking and law abiding society

would accept the shockingly lenient sentence imposed on an accused person with a long list of previous convictions; exactly the same of which she was convicted on the day in issue. This is the typical sentence that will easily encourage society, in particular members of the business community, to take the law into their own hands. The sentence is unfair, imbalanced and clearly not thought through at all. The basic triad of *Zinn* [13] was totally disregarded and not even considered.

[26] To add insult to injury the magistrate declared the accused fit to possess a firearm without holding a proper inquiry. She in effect placed a firearm in the hands of an individual that has no respect for the law.

[27] Finally, *ex facie* the charge sheet, specifically, the J15 it is clear that the magistrate in this matter was recently appointed .To the extent that this may be an indication of lack of training or indepth training on the issue under our focus in this matter. The Chief Magistrates of both clusters and their provincial training committees are implored to pay attention to the application of s112(1)(a) as opposed to s112(1)(b) as set out in the cases of this Division referred to above in order to avoid a recurrence of this nature. This is evidently not an isolated incident judging by the number of Full Bench decisions of this Division on this very aspect between 2000 and 2015. The matter should also be brought to the attention of the South African Judicial Education Institute (SAJEI) for the benefit of newly appointed magistrates in other parts of the republic.

[28] The Chief Magistrates of both clusters are also encouraged to explore guidelines along the lines set out above and to review the current system as opposed to the one which runs in line with the notion of institutional independence of a judicial officer i.e That upon discovering a mistake or an error in one's own judgment and order, a presiding officer may, on his or her own, submit such judgment to the High court on special review in terms of s304 to avoid any unnecessary delay. This is so because s304 does not

[13] S v Zinn 1969 (2) SA 537 (A). See also S v Malgas 2000(1) SACR (SCA).

make specific provision that matters sent on special review to the High court should be sent by the Chief Magistrate or Senior Magistrate only. Consequently there is, in principle, nothing that bars the presiding judicial officer seized with the matter to refer the matter on special review. However, pending these proposed guidelines and review of the current system in respect of special reviews; magistrates must not send special review matters under their own names but through the designated Senior Magistrates or Chief Magistrates.

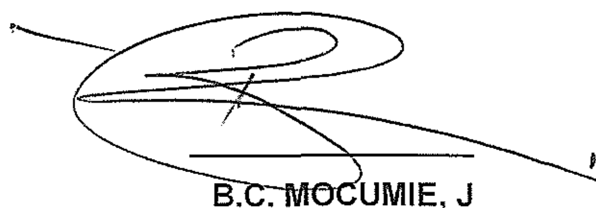
[29] Having said that, it would be academic and of no relevance at this late stage to refer the matter back to the trial court for a trial *de nova.* Such remedy would cause more prejudice to the accused person who is already released from custody; having served three months. That is the travesty of this matter.

ORDER

'1. The conviction and sentence are set aside.

2. The order in terms of section 103(1) of the Firearms Control Act 60 of 2000 is set aside.

3. A copy of this judgment must be forwarded to the Chief Magistrates Bloemfontein and Welkom and the Director of Public Prosecutions: Free State, Bloemfontein with specific reference to paragraphs [15] to [23] of this judgment.'



B.C. MOCUMIE, J

I concur.

L. OPPERMAN, AJ