Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates:	YES/**NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

REVIEW NUMBER: HC 05/2023

MAGISTRATE'S SERIAL NUMBER: 5/2023

MAGISTRATE'S CASE NUMBER: B365/2022

THE STATE

versus

GIDEON PETRUS DU PREEZ **Accused**

CORAM: PETERSEN ADJP; REDDY AJ
DATE RECEIVED: 20 OCTOBER 2023
DATE HANDED DOWN: 1 NOVEMBER 2023

Summary: Special Review – automatic review – conviction upon plea of guilty without section 212(4) and 8(a) affidavits in terms of the Criminal Procedure Act 51 of 1977 (scientific analysis of substances purported to

be drugs as listed in Part 3 of Schedule of the Drugs and Drug Trafficking Act 140 of 1992) – conviction and sentence set aside.

ORDER

(i) The conviction and sentence are set aside.

(ii) The accused must be released forthwith, unless otherwise lawfully detained.

REVIEW JUDGMENT

REDDY AJ

[1] This matter serves before me as an automatic review in terms of the provisions of section 302 of the Criminal Procedure 51 of 1977 ("the CPA"), which was laid before me on **19 October 2023**.

[2] The accused was arrested on **3 November 2022** and charged with a contravention of section 4(b) read with sections 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992 ("the DDTA"). The charge drafted by the prosecutor reads that on the said day the accused did wrongfully and unlawfully have in his possession an undesirable dependence producing substance as

listed in Part 3 of Schedule 2 of the DDTA, to wit 10 small plastic bags of crystal myth (which appears to be a reference to meth according to its street name) and 1 small black plastic bag of kath (which appears to be a reference to cat according to its street name).

[3] The formulation of the charge by the prosecutor leaves much to be desired. It fails to follow the specific identification of the substances alleged to be undesirable dependence producing substances as listed in Part 3 of Schedule 2 of the DDTA, which lists the specific scientific formulation of such substances. This the prosecutor would only have been able to do if the substances were submitted to the South African Police Service Forensic Science Laboratory for analysis and such substances were found to be as listed in Part 3 of Schedule 2 of the DDTA. As will be demonstrated below, this contributed to the gross irregularities in the plea proceedings and consequently the conviction of the accused. The learned authors Du Toit, De Jager, Paizes, Skeen and Van der Merwe *Commentary on the Criminal Procedure Act* at RS64 Ch 14 page 2 capture the salutary duties of a prosecutor in drafting charge sheets as follows:

> "The drafting of charge sheets is the prerogative of the prosecution and is done on the basis of the allegations contained in the docket (*S v Prinsloo* [2014] ZASCA 96 (unreported, SCA case no 534/13, 15 July 2014)). It has been said that when a prosecutor drafts the charges 'he is performing an important public … task which can have very important consequences for the public at large and especially for an accused'. See *Moodley & others v National Director of Public Prosecutions & others* 2008 (1) SACR 560 (N) at [26] and *Mahupelo v Minister of Safety and Security & others* 2017 (1) NR 275 (HC) at [130]. The importance of the prosecutorial task of identifying and formulating the relevant charge(s) is highlighted by the fact that a conviction

'can only occur in respect of a charge on which an accused is indicted, or a competent verdict in respect thereof' (*S v Bam* 2020 (2) SACR 584 (WCC) at [54]). In *S v White* 2022 (2) SACR 511 (FB) at [6] the review court reiterated that charge sheets must be properly prepared. In this case, irrelevant words had not been deleted from the pro forma charge sheet (it made little difference that it was not read in court) and, when reading the charge sheet in court, the prosecutor added a word that did not appear in the typed charge sheet." (emphasis added)

[4] The accused made his first appearance before **Magistrate Ngakane** on **4 November 2022**. Pursuant to a terse explanation of his rights to legal representation as evinced in terms of the provisions of section 35(3)(f) of the Constitution of the Republic of South Africa, Act 108 of 1996, the accused elected to conduct his own defence. Bail was summarily set in the amount of R1000-00, without a proper and correct application of the relevant bail provisions.[1]

[5] On **14 December 2022**, the bail of the accused was finally forfeited to the state due to his non-appearance. On **16 January 2023**, the accused appeared on a warrant of arrest, whereafter his rights to legal representation were repeated with the accused confirming his earlier decision to conduct his own defence.

[6] On **15 February 2023**, the accused pleaded guilty to the offence so charged. The Magistrate invoked the provisions of section 112(1)(b) of the CPA, which eventually resulted in the accused being convicted of contravening section 4(b) of the DDTA which he

[1]See: Section 60(11B)*(a)*, *(b)* and *(d)* of Act 51 of 1977.

allegedly committed on **3 November 2022**. The conviction ensued without a clear indication by the prosecutor if the facts which were admitted during the questioning, as envisaged in section 112(1)(b) of the CPA, were in accordance with the facts at the disposal of the State. Significantly, the Magistrate did not request the prosecutor to produce for admission or denial by the accused, evidence related to the chain of custody of the substances allegedly found in his possession and an analysis certificate in terms of section 212(4) and 8(a) of the CPA.

[7] The matter was postponed after conviction for a pre-sentence report and on **7 June 2023**, the accused was sentenced to eighteen (18) months imprisonment, with no peremptory ancillary orders.

[8] The uncertified typed record does not correlate with the manuscript record which the Magistrate ought to have perused. The digitally transcribed record that has been attached is incomplete as there is no certification by the transcriber of the record attesting to the authenticity and accuracy of the proceedings. The digitally recorded proceedings on **15 February 2023** in terms of section 112(1)(b) of the CPA were as follows:

COURT: Does he understand the charges against him?

ACCUSED: Yes, Your Worship.

COURT: How does he plead?

ACCUSED: Guilty, Your Worship.

ACCUSED PLEADS GUILTY TO THE CHARGE

COURT: Now the Court is going to ask him questions in terms of the provisions of Section 112 (1) (B) of Act 51 of 1977. Is his names Gideon Petrus du Preez?

ACCUSED: Correct, You Worship.

COURT: Do you admit that on 3 November 2022 you were at Lichtenburg?

ACCUSED: Correct, Your Worship.

COURT: What happened on that day?

ACCUSED: I was at home your worship that day busy using my things- drugs and the police came.

COURT: Doing What? You must speak-up.

ACCUSED: I was busy smoking your worship the time when the police arrived.

COURT: Then what happened?

ACCUSED: Then the police arrested me and they read my constitutional rights, your worship.

COURT: And then what did they find in your possession?

ACCUSED: they found 10 small plastic bags of Crystal -meth and one small bag of CAT, your worship.

COURT: C-A-T.

COURT: Do you know that those items you have just mentioned here they are classified as undesirable dependence producing substances as listed in part 2 of the Drug Trafficking Act?

ACCUSED: Yes, Your Worship

COURT: Do you further know that it is wrongful and unlawful to be found either using yourself or being in possession thereof?

ACCUSED: Yes, Your worship.

JUDGMENT:

GUILTY AS CHARGED

[9] Afore a proper consideration of the section 112(1)(b) proceedings, I have serious misgivings whether the proceedings are in accordance with justice. The application of section 112(1)(b) of the CPA, in conjunction with the elements of the offence of contravening section 4(b) of the DDTA of 1992, in my view, are incurable, more especially given the absence of any evidence on the chain of custody and a certificate in terms of section 212(4) and 8(a) of the CPA, to ascertain the correctness of the admissions made by the accused.

[10] Consideration was given to directing a query to the Magistrate, given my misgivings as aforesaid. However, given the fact that the accused is incarcerated and that reviews are treated as inherently urgent, I elected not perpetuate the prejudice and deal with the review in the absence of any input from the Magistrate.

[11] The focal point of discontentment with the application of section 112(1)(b) of the CPA by the Magistrate relates to the admission by the accused that he knew that crystal meth (methamphetamine*)* and Cat (*Methcathinone) are classified as undesirable dependence producing substances as listed in Part 3 of Schedule 2 DDTA of 1992. Sight must not be lost of the indisputable fact that the accused made this admission whilst unrepresented and that there is no indication that the accused was explained and favoured with any scientific analysis that was relevant to his case.*

[12] In *S v Naidoo* 1985 (2) SA 32 (N) Thirion J at 37 G - H said the following in this regard:

> "But before it can convict the accused, the court has to be satisfied, on the facts stated by the accused, that the accused is indeed guilty. The court therefore not only has to ascertain whether the admitted facts, if accepted as correct, would establish all the elements of the offence but it also has to pass judgment on the reliability of the admissions. Only if the court is satisfied as to the reliability of the admissions of fact and that they are sufficient to establish all the elements of the offence may the court convict the accused. Where an accused admits facts which are within his personal knowledge, no difficulty ordinarily arises. In such a case the presumption of fact that what an accused admits against himself may be accepted as the truth would operate and, provided the accused makes the admission with full knowledge of its implications, there would be no reason why the court should not be satisfied about its correctness and reliability."

[13] A year earlier, in *S v Chetty* 1984 (1) SA 411 (C), the following was said specifically about certificates prepared by analysts:

> "In the ordinary course the State can and should hand in a certificate of an analyst which proves itself and causes no problems that what has been

found is what it is alleged to be. There may of course be other methods by which the questioner could satisfy himself that the accused had good reason to accept that the pills he intended dealing in were what they purported to be or did contain the drug in question - perhaps because he had purchased them from a “reliable" source, or had tried one himself, or that some of his own experienced customers were satisfied with their purchases from the batch in question.”

[14] The learned authors Du Toit, DeJager, Paizes, Skeen and Van der Merwe *Commentary on the Criminal Procedure Act* at RS64 Ch 17 page 21-22 state as follows in this regard:

“The general rule in our law of evidence is that a court may accept and rely upon an admission of an accused despite the fact that the fact admitted falls outside the personal knowledge or experience of the accused ... It would seem, however, that the High Court has adopted a more cautious approach with regard to the plea procedures in terms of ss 112 and 115 where admissions are made by undefended accused ...

It should further be borne in mind that s112(1)(b) does not provide for the conviction of the accused merely because he himself believes that he is guilty ...”

[15] Under our constitutional dispensation, the approach to pleas of guilty by undefended accused and admissions elicited in that regard, was succinctly stated in *S v Aucamp and Six Similar Cases* 2002 (1) SACR 524 (E) as follows:

“… the Legislature seeks to protect accused persons from conviction simply by virtue of their pleas of guilty, which experience has shown may for various reasons be erroneous. The presiding judicial officer, whether a Judge, regional magistrate, or magistrate, may only convict an accused person of an

offence in respect of which he or she has pleaded guilty if the judicial officer is satisfied that such accused is so guilty and this the judicial officer must establish either by questioning the accused with reference to the alleged facts of the case to ascertain whether the accused admits the allegations in the charge to which he has pleaded guilty or from the written statement by the accused or his legal adviser thereanent, supplemented by any questions to the accused by the judicial officer concerned in clarification thereof.

The difficulty, however, that sometimes arises, and this is germane to the cases with which we are here dealing, concerns admissions made by an accused of which he or she has no personal knowledge. In this regard it is appropriate to quote what Leach J, with whom Pickering J agreed, said in the unreported case of *S v Yongana Maurice Mtiki and Others* CA & R 577/99 delivered on 16 November 1999, namely:

'It has been held in certain decisions that the admissions made by an accused during questioning under s 112 must fall within his knowledge and experience - see for example *S v N* 1992 (1) SACR 67 (Ck) at 68*h* - *i* and the cases there cited. That seems to be going too far as it appears to be well settled that an admission of fact not within an accused's personal knowledge may well be admissible against him - see *S v Mavundla* 1976 (4) SA 731 (N) at 733A and *S v Sephiri* 1979 (2) SA 1168 (NC). But as was pointed out in *S v Nongabe* 1990 (2) SACR 522 (O), an admission of fact not within an accused's personal knowledge, albeit admissible, may lack meaningful probative value dependig upon the circumstances of the case - see further for example *S v Naidoo* 1985 (2) SA 32 (N) at 37 in which Thirion J remarked that considerations such as the sufficiency of the accused's source of knowledge may become of decisive importance…."

[16] In *S v Adams* 1986 (3) SA 733 (C), the following was said in respect of a plea of guilty on a charge of contravention of section 2(a) of Act 41 of 1971 (the predecessor of the current DDTA):

"Where an accused is charged with contravening s2(a) of Act 41 of 1971 in respect of a prohibited dependence-producing substance such as mandrax, and he pleads guilty and makes the admission that the substance is indeed mandrax, the court will normally be entitled to convict him where he is represented by a legal representative. Where, however, the accused is an inexperienced person who is unrepresented, the position is different. In such an event, the court may not simply accept his admission of an unknown fact. There would have to be additional grounds on which the court could rely that the admitted fact is true before the court can be satisfied that the accused is guilty. The assurance concerning the acceptance of a fact which is admitted but which is beyond the personal knowledge of such an accused can be obtained in different ways, for example, by closer questioning of the accused in order to determine the strength of the knowledge on which he has made the admission, or what his knowledge of the matter and the surrounding circumstances are, or by examining the relevant certificate of analysis of the substance. Whether there is then sufficient evidence for the Magistrate to convince him that the accused is guilty will depend on the facts of the particular matter. What however must still be borne in mind, is that it is the court's duty to convince itself of the accused's guilt and that the court is not relieved of this duty in this regard merely by such an unrepresented and inexperienced accused admitting a fact which is beyond his knowledge."

[17] The aforesaid authorities are succinctly encapsulated and vocalized by Henney J in *S v Paulse* 2022 (2) SACR 451 (WCC) at paragraph [11] where the following is stated:

"It is clear from the authorities cited that where an accused pleads guilty to a charge where one of the elements of the crime can only be proven by scientific means, the court must request the prosecutor to hand up the analysis certificate in terms of the provisions of section 212 of the CPA to satisfy itself that during the s 112 (1)(b) admission was correctly made. In this case, the accused admitted to being in possession of an undesirable dependence producing substance, in contravention of section 4 (b) of the

DDTA, and the court convicted the accused without satisfying itself by means of the scientific evidence in the form of the section 212 certificate that such an admission was correctly made." (emphasis added)

[18] In this matter, the Magistrate misdirected himself on two scores. Firstly, the Magistrate had no factual foundation within the subset of the accused personal knowledge of the facts that underpinned the accused admissions of a scientific nature, and secondly, the Magistrate did not elicit from the prosecutor statements relevant to the chain of custody of the substances or the certificate in terms of section 212(4) of the CPA for admission or denial by the accused, to satisfy himself that the admission by the accused of being in possession of an undesirable dependence producing substance was correctly made. Magistrates are duty bound to insist that the prosecutors produce the most reliable scientific evidence in the form of the section 212(4)(a) and 8(a) certificates and statements before convicting the accused, to ensure that the admissions made were correctly done.

[19] An examination of the record explicitly indicates that the Magistrate was not possessed of the same. The entire admission that formed the nucleus of the scientific admission was a question based on an extraction of from the annexure to the charge sheet and the accused simple response of "yes." This was wholly inadequate and an unreliable admission to underscore the conviction of the accused.

[20] As alluded to *supra*, the accused was sentenced on **7 June 2023**. The review record was laid before me on **19 October 2023**, more than four months after the accused had been sentenced. The circumstances attributing to the delay are unknown. No attempt has been made by the Magistrate to explicate the reasons for the delay. The record was unaccompanied by an apology. This reflects poorly on the administrative component of the District Court concerned and on the Magistrate who to my mind ought to have some oversight on ensuring the timeous dispatch of the record to the Registrar. See: *S v Lewies* 1998 (1) SACR 101 (C) at 104B.

[21] The review process is an integral component in the attainment of an accused's right to a fair trial. Section 303 of the CPA is peremptory and prescribes the timeframe in which review proceedings must be dispatched to the Registrar of the High Court having jurisdiction. Matters that fall within the purview of the automatic review procedure are inherently urgent. The urgency of the automatic review procedure is inextricably linked to amongst others to a trial without unreasonable delay, the right to dignity, freedom and access to the court, and the right to appeal and review. See: *S v Fransman and Another* 2018(2) SACR 250 WCC at paragraph [27]. This practice must be deprecated.

[22] In the premises I make the following order:

(i) The conviction and sentence are set aside.

(ii) The accused must be released forthwith, unless otherwise lawfully detained.

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A REDDY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

I agree.

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A H PETERSEN
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA, NORTH WEST DIVISION, MAHIKENG