

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)**

[REPORTABLE]

CASE NO: 1287

Special Review

In the matter between:

CALVERN TONG

Applicant

And

THE STATE

Respondent

REPORTABLE REVIEW JUDGMENT

Coram: Samela, J et Henney, J

Judgment by: Henney, J

Judgment dated : 7 September 2012

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HENNEY, J:

BACKGROUND

[1] This matter served before me by way of Special Review.

The Applicant was arrested by the Woodstock police on 1 November 2008 on a charge of possession of dagga in contravention of Section 4(b) of The Drugs and Drug Dependency Act 140 of 1992. The Appellant paid an admission of guilt fine of R200,00 in terms of section 57 of the Criminal Procedure Act 51 of 1977 ("the Act") and was released from custody on the same day.

[2] In support of the application the Applicant filed an affidavit wherein he states that on the day in question he was at Arnold Street, Observatory to meet some friends. On his way he was stopped by the police in the street near a small packet that was lying in the street near plants on the side of the road. The policeman opened the packet and it was found to contain dagga. As a result of this, he was arrested and placed in custody in police cells at the Woodstock police station. His father was later informed by a police detective that he should pay R300,00 to facilitate his release. His father only later paid the R200.00 admission of guilt fine, at the Woodstock police station. He was asked to sign various documents. He was not offered any legal representation, nor did the police explain the court processes to him. Upon the Applicant's release, he was also not informed that he paid an admission of guilt fine.

[3] He was not consulted and did not agree to pay a fine. He was under the impression that he would later be informed about a court date and that he had been released on bail. On his release, the police had asked him to provide them with an address. He waited for the next court date and he received no notice.

[4] On 2011 after he concluded his studies in Film, and completed short courses in TEFL (Teaching English and Foreign Languages) he submitted applications for employment. He was subsequently offered employment in South Korea to teach English, with a monthly salary of R13 500,00. The terms of employment required that he apply for a visa and was surprised to find out that he had a criminal record as a result of this case and that his criminal record was linked to his identity number.

[5] As a result of this criminal record, he is severely prejudiced and cannot qualify for any teaching

placement. He is also unable to obtain any freelance opportunities in the filming industry which may require him to travel abroad. The records of this case at Cape Town Magistrates Court have been destroyed. The Applicant further avers that he is prejudiced by the outcome of this case as he was not afforded an opportunity to present his defence in court and to adduce evidence. He states that he would have elected to defend the charge levelled against him.

[6] **APPLICABLE LEGAL PROVISIONS**

In this case a notice was given to the Applicant in terms of Section 56 (1) of the Act.

This notice is issued to an accused, if a peace officer on reasonable grounds believes that a magistrate's court, upon convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette. The amount determined by the Minister in terms of GN 239 in GG 24393 dated 14 February 2003 was determined at R2 500.

In terms of this procedure, a written notice given to an accused shall:

- 1) specify the name, residential address, and the occupation or status of the accused;

- 2) call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question;

3) contain an endorsement in terms of section 57 that the accused may admit his guilt in respect of the offence in question and he may pay a stipulated fine in respect thereof without appearing in court.

4) contain a certificate under the hand of the peace officer that he/she has handed the original of given written notice to the accused and explained to the accused the import thereof (own emphasis). What precisely had to be explained to an accused I will deal with later in this judgment.

[7] Should an accused person elect to pay an admission of guilt fine upon being issued a written notice in terms of section 56(1), the provisions as set out in section 57 (1)(b), 57(2)(a) and section 57(6) and section 57(7) of the Act will apply. In terms of section 57(1)(b) the accused may without appearing in court admit his guilt by paying the fine stipulated either to the clerk of the magistrate's court with jurisdiction or at any police station within the area of jurisdiction of the court.

[8] In terms of section 57(3)(a), an accused who elects to pay an admission of guilt shall surrender the written notice at the time of the payment of the fine. Usually a receipt is given to the accused as proof of payment. In terms of section 57(6), the written notice surrendered upon payment of the fine shall be forwarded to the clerk of the court who will make an entry of the essential particulars thereof in the criminal record book for admissions of guilt. Upon doing this, the accused concerned, subject to the provisions of section 57(7), is deemed to have been convicted and sentenced by the court in respect of the offence in question.

Analysis

[9] In this particular matter, the conviction and sentence which followed upon the applicant paying an admission of guilt fine resulted in the applicant having a previous conviction recorded against his name.

[10] The difficulty in this matter is that there is an allegation where there is no evidence to the contrary, that the police did not explain to the applicant his rights before he paid the admission of guilt fine. There is a further allegation that the police did not explain the impact of paying an admission of guilt to the applicant, and also that the paying of an admission would result in him having a previous conviction recorded to his name.

[11] The office of the Director of Public Prosecutions was requested to submit their views on this matter. According to their submission, the allegations made by the applicant in his affidavit cannot be properly responded to due to the fact that the police docket in this case could not be traced. Such a difficult situation can be the unfortunate result of a person only realising after a considerable period of time that the payment of an admission of guilt fine will result in a previous conviction.

[12] *Dlodlo J*, in the matter of *The State v Michelle Parsons*, Case No: 111202, which judgment was delivered on 15 June 2012, had to contend with a similar matter, where the accused said the following in her affidavit ... *"I was issued with a fine, but never was it explained to me that I would receive a criminal record"*.

[13] In this matter there is no record that the written notice required to be issued in terms of section 56 had contained a certificate under the hand of a peace officer that he or she has handed the

original of such written notice to the accused and that he has explained to the accused (applicant in this matter) the import thereof. This review therefore has to be determined on the version as set out in the affidavit of the applicant.

[14] The applicant's conviction based on the admission of guilt fine which resulted in a previous conviction gives rise to serious consequences for him. The payment of an admission of guilt is premised on the fact that a person paying such an admission of guilt would have been fully appraised of his or her rights and the consequences thereof before electing to do so.

[15] *Du Toit: Commentary on the Criminal Procedure Act* at 8-4 states:

"By electing to pay an admission of guilt fine an accused waives several important procedural rights which he would have enjoyed at a trial—most notably his right to be sentenced only upon proof beyond reasonable doubt that he did commit the offence in question. See also generally S v Mans 1990 (1) SACR 75 (T) 78d-h. Other concomitant rights would include the right to confront his accusers, the right to testify in open court and the right to call witnesses. It is against this background of procedural rights which are waived that the legislature has created elaborate machinery contained in s 57: for example, the accused is given time to consider his position and exercise his options (see s 57(2)(a) read with s 57(2)(b)); and s 57(7) grants to the presiding officer concerned 'a form of review'."

[16] In this matter the allegations are as follows: Firstly, the Applicant avers that the consequences and impact of paying an admission of guilt fine were not explained to him, especially with regard to the fact that will result in the applicant having a previous conviction and a criminal record. In the *Michelle Parsons (supra)* matter *Dlodlo J* said at [3] ... *"Where the fine was paid either at the Police station or some other local authority, money together with the summons or written notice to appear gets sent to the clerk of the Court having jurisdiction. The latter completes the criminal*

case book for admission of guilt. Once the necessary entry has been made, the accused is deemed to have been correctly convicted. Such a conviction is regarded as a conviction for all statutory and common-law offences. It is so serious such that for instance, it would serve as basis for the termination of a lease which contains a clause to the effect that should a lessee be convicted of any offence the lease would be terminated. See: NGJ Trading Stores (Pty) Ltd v Guerreiro 1974 (4) SA 738 (A).

[17] To be labelled with a previous conviction on the basis of a mere mistaken payment of an admission of guilt fine has serious consequences as was stated by *Dlodlo J*. It strikes at the heart of the rights of a person such as the Applicant in this case, as *Dlodlo J* remarked in para 5 on page 6.

[18] A person's right to dignity, freedom, security of person, employment, privacy, freedom of movement and residence, fair trial in terms of Section 35(3) to name but a few may be severely infringed, if a person finds him or herself in a situation such as that in which the Applicant finds himself. The Applicant is unable to find suitable employment due to his previous conviction. He is also unable to acquire a visa to travel abroad.

[19] Secondly, the Applicant avers that his right to legal representation and his right to contest the allegations in an open court were also not explained. If this was not done then he could not have waived his rights in order to pay an admission of guilt because he did not have any knowledge of these rights.

[20] Thirdly, it is averred by the Applicant that in this case the payment of the admission of guilt fine was used as a bargaining tool by the police to effect his release from custody. The Applicant was not given the choice as stipulated in terms of Section 57(2)(a) to pay the admission of guilt fine

before a date specified in the Summons or written notice. The police rather immediately enforced payment to effect the release of the Applicant. This was unlawful, in a situation where the Applicant had not expressly waived his election to consider to pay at a later date or contest the matter in court.

[21] In *S v Cedras 1992 (2) SACR 530 (C)* this court had laid down certain guidelines that a court should follow in dealing with reviews of this nature at 531 I -532 B.

"The review power under s 304(4) clearly applies to the procedures under s 57 of the Act which culminate in the deemed conviction and sentence of an accused. S v Louw (supra).

In such cases the question must always be whether there are considerations of equity and fair dealing which compel the Court to intervene to prevent a probable failure of justice. There must be evidence before the Court showing the likelihood of such inequity should it not intervene. A Court must be satisfied that the admission of guilt was probably mistaken or incorrect and the accused or other person deposing on oath on his behalf must give a satisfactory explanation as to how the admission of guilt came to be mistakenly or erroneously made. Good cause must be established for condoning the error or mistake in making the admission of guilt. It must be established that, were the charge to go to trial, the accused would have a probable or arguable defence to the charge and that his deemed conviction or sentence is, accordingly, probably not in accordance with justice".

This position as set out in *Cedras (supra)* was confirmed once again by this court in *S v Price 2001 (1) SACR 110 (C)*.

[22] The Applicant has indeed shown that having regard to the guidelines set out in *Cedras (supra)* and as confirmed in *Price*, the grounds set out above justify this court's intervention. The fact that there was an infringement of his rights which would make the whole payment of the admission of guilt which resulted in a conviction procedurally unfair, strengthens the argument that the court

should intervene.

[23] The system allowing the payment of admission of guilt fines is an indispensable and important component of our criminal justice system. It grants a person an opportunity to admit guilt for less serious offences which lessens the burden on our already overloaded criminal justice system. I must also hasten to add that not all admission of guilt fines especially those for less serious traffic offences and transgressions of by-laws would have the effect that a person will have a previous conviction.

The integrity of the system of the payment of admission of guilt fines especially where the payment of such fines would result in a person acquiring a criminal record, should be beyond reproach. That is why there are safeguards and a system of "review" had been created in terms of Section 57.

[24] Therefore, to avoid any injustices when a person is granted an opportunity to pay an admission of guilt fine, I am of the view that the procedure *Dlodlo J* in the *Michelle Parsons* matter propose at paragraphs 5-6 should be followed.

"[5] The afore-going is dangerously attractive to an unsuspecting member of the public. Members of the public do not ordinarily like to appear before the magistrate. There are many reasons for this, including but not limited to ordinary resentment to sit on the dock and be seen by other persons and time that is so precious that often gets wasted by Court attendance. We live in a constitutional democratic era. Human rights are enshrined in the Constitution of this Country. It is not only fair to draw the accused person's attention to the fact that a conviction shall be noted against his name, but it is constitutionally obligatory on the part of an officer serving such an accused person with either the summons or a written notice to appear.

[6] The written notice to appear (in terms of section 56 of the Criminal Procedure Act) which is currently in use merely reads as follows:

"You are hereby called upon in terms of section 56 of the Criminal Procedure Act, 1977 (Act 51 of 1977), to appear before the above-mentioned Court on the date stated above at 09:00 to answer a charge of:.....or such other charge as the Public Prosecutor may bring against you on the grounds that upon or about the.....in the said district you did

wrongfully and unlawfully.....An admission of guilt fine of R.....may be accepted.

***Note:** (i) An admission of guilt fine can only be paid at either the Clerk of the Magistrate's Court which has jurisdiction in respect of the offence in question or at any police station within the area of jurisdiction of that Court, (ii) If you intend paying an admission of guilt fine, payment should be effected before or on... (Hi) You may admit your guilt in respect of the offence in question by paying the stipulated fine in respect thereof without appearing in Court.*

***Warning:** If you fail to comply with this notice or to remain in attendance at the proceedings you may be arrested and sentenced to a fine or imprisonment....."*

Nowhere in the above-quoted written notice to appear is there a warning that payment of the stipulated admission of guilty fine translates to a conviction. This is not fair to unsuspecting members of the public. This form needs improvements because as it stands it may not pass the Constitutional muster. It cannot be left to the police officer serving an accused person with the written notice to appear to also explain to such an accused person that "look upon payment of this admission of guilt fine you shall be deemed (for legal purposes) to have been duly convicted and an entry shall be made correspondingly in the SAP69." The form quoted above came into existence prior to the present constitutional era. At that time no emphasis was placed on the rights of an accused person at all. The correct procedure is that the police officer must warn the accused about the conviction record. An endeavour must also be made by the powers that be to include this warning on the prescribed Notice to Appear which is handed to an accused person", (own emphasis)

[25] A peace officer must warn the accused of the full consequences of paying an admission of guilt fine. As such, the accused must be informed that he/she will be deemed to have been sentenced and convicted by the court with jurisdiction in respect of the offence in question. It must be furthermore explained to an accused that, if it is indeed the case, such conviction will appear on the accused's criminal record. A police officer must further inform an accused that as a consequence of paying an admission of guilt fine, an accused would be waiving the right to be sentenced only upon proof beyond reasonable doubt that one is guilty of the commission of the offence, the right to contest the allegations in open court, the right to confront one's accusers, the right to call witnesses **and the right to legal representation.**

A police officer must state in the certificate referred to 56(1)(d) contained in the written notice that he/she has indeed warned the accused in the above manner.

[26] There is further protection for a person who pays an admission of guilt in terms of Section 57. In terms of S57(7) the Magistrate who oversees the admission of guilt register at a later stage, does not exercise a mere administrative supervisory power.

In Sv Marion 1981 (1) SA 1216 TPD EloffJat 1218H- 1219A held"According to my interpretation of SS(7) the Magistrate concerned is obliged in every case whether the Clerk of the Court place before him the documents relating to an admission of guilt fine, to apply his mind to them and come to a conclusion as to whether or not the deemed conviction should stand or be set aside".

[27] A Magistrate who therefore exercises his or her power in terms of S57 should do so judiciously. Before a magistrate can conclude that a conviction based on the payment of an admission of guilt fine is in accordance with justice the Magistrate should:

(a) Be satisfied that a peace officer has certified in the section 56(1) written notice that he/she had explained the import of such notice, and in particular, had warned the accused, in the manner as set out in para 25 of the consequences of the payment of an admission of guilt fine.

(b) (Be satisfied) that an accused person had been given an opportunity to consider the payment of the fine or elect to appear in court to contest it;

(c) (Be satisfied) that notwithstanding any of the warnings that may have been given to the accused person, such person elected to freely and voluntarily pay the said admission of guilt.

Only thereafter having taken all the circumstances into consideration, can a Magistrate conclude

that the conviction was in accordance with justice.

The Registrar should forward a copy of this judgment to the Magistrate's Commission and National Police Commissioner.

In the result therefore, I hold that the conviction of the accused in terms of section 57(6) for having contravened Section 4(b) of the Drugs and Drugs Dependency Act 140 of 1992 was not in accordance with justice and it is set aside.

Judge of the High Court

HENNEY, J

I agree.

Judge of the High Court

SAMELA, J