In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: High Court Ref No. 217/21
Magistrate's Serial No: 01/2020
Case No. C1053/2019

In the matter between:

THE STATE

And

MATTHEW ROSSOUW **Accused**

JUDGMENT DELIVERED ON 24 MARCH 2021

LEKHULENI AJ

INTRODUCTION

[1] This is an automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977 ("*the CPA"*). The accused, appeared in the Somerset West district court on a charge of assault with intent to do grievous bodily harm, under case No C1053/2019. He conducted his own defence, and after questioning by the magistrate he was convicted and sentenced to 12 months' imprisonment.

FACTUAL MATRIX

[2] The allegations against the accused were that on 29 September 2019, he unlawfully and intentionally assaulted one Anita Rossouw (his mother) by hitting her with a beer bottle on her head once. On 29 November 2019, the charge was put to the accused in terms of section 105 of the Criminal Procedure Act 51 of 1977 ("*the CPA"*) and the accused pleaded guilty to the charge. The court then invoked the provisions of section 112(1)(b) of the CPA. Upon questioning by the court, the accused admitted hitting the complainant with a beer bottle but denied that he knew that what he was doing was wrong and punishable in law. Despite the fact that he did not admit knowledge of the unlawfulness of his conduct, the court noted that it was satisfied that he admitted all the elements of the offence and found the accused guilty as charged.

[3] The State proceeded to prove previous convictions against the accused and the matter was postponed to 20 January 2020 for pre-sentence reports consisting of both the Probation and Correctional Officers' Reports. On 20 January 2020, the prosecutor informed the court that the Correctional Officer's report was available and same was handed to the court as an exhibit. She also informed the court that the Probation Officer's report was not requested due to an oversight on the part of the State. The magistrate indicated that he will not delay the matter any further more especially that the accused was in custody.

[4] The magistrate proceeded with sentencing proceedings and noted the recommendations of the Correctional Officer to the effect that a sentence in terms of

section 276(1)(h) of the CPA was not a suitable sentence. The Court took into account the fact that the accused was 32 years old; that the accused was unmarried and that he had a child who is living with the mother. The court eventually sentenced the accused to a fine of 12 months' direct imprisonment.

[5] Months later, the matter was forwarded to the High Court for automatic review in terms of section 302 of the CPA. The matter was previously allocated to a judge of this Court on 30 July 2020 for purpose of considering an automatic review in terms of s 302 of the CPA. The then reviewing judge returned the record to the magistrate, on 31 July 2020 with the following queries:

1. On page 5 of the transcript the accused says that he did not admit knowledge of wrongfulness, but without further ado was convicted.
2. On page 12 the accused was not informed of his rights to make representations to the review Judge.
3. Please explain why the conviction is proper.

[6] The matter was returned to this Court, on 08 March 2021 with the response of the relevant magistrate to the queries of the reviewing judge. In his response, the presiding magistrate admitted to the fact that he read the record and have ascertained that the accused did not admit knowledge of wrongfulness. He stated that it was an oversight on his part as he might have misunderstood the interpreter. He chose to abide the decision of this court.

[7] The matter was subsequently placed before me for consideration of the review. It is the duty of this Court in reviewing this matter to ensure that the proceedings in the court *a quo*, as well as the conviction and sentence, were in accordance with justice. It is apposite to consider the procedure that unfolded in the court *a quo* before turning to the conviction and sentence.

[8] The accused appeared in court for the first time on 10 October 2019 and his rights to legal representation were explained to him. He chose to conduct his own defence. The matter was postponed to 6 November 2019 for further investigations. On 06 November 2020, the matter was postponed finally to 29 November 2019 for further investigations. On 29 November 2019, the prosecutor informed the court that the investigations were complete. On this date, the court still confirmed with the accused if he still wanted to conduct his own case and the accused confirmed that he did not want legal aid representation. The accused also informed the court that he was going to plead guilty to the charge. The prosecutor informed the court that pursuant to the accused wanting to plead guilty she would proceed to have the matter finalized.

[9] Before she could put the charge to the accused, the prosecutor asked the court for permission to approach the accused before they could go on record. After consulting the accused, she informed the court that the accused is admitting all the elements of the crime and the court directed her to proceed reading the charge to the accused and she obliged. After the charge was put to the accused, the court asked the accused if he understood the charge against him and the accused

confirmed that he did. The court proceeded to enquire from the accused how he would plead to the charge, and the accused indicated that he was pleading guilty. The prosecutor asked the court to invoke the provisions of section 112(1)(b) of the CPA.

[10] For the sake of completeness, the relevant parts of the court's questioning of the accused in terms of section 112(1)(b) of the CPA was as follows:

"Court: Mr Rossouw were you upon or about 29 September 2019 at or near 29 [indistinct] in Macassar in the district of Somerset West?

Mr Rossouw: That's correct your worship.

Court: Thank you. Briefly tell this court in your own words as to what happened there that is (*sic*) made you to be standing before this court today pleading guilty to a charge of assault with intent to do grievous bodily harm. Tell us what happened sir, we were not there. Try and speak up sir.

Mr Rossouw: Your worship I was in the home (*sic)* in the sleeping room *(sic)* while I was busy watching TV. My mother was busy preparing some food for us to eat. Just before we go to eat your worship I go to her and ask her something, then we started to argue your worship because she was screaming at me. After that I told her she must stop screaming at me your worship because I didn't feel nice about it. Afterwards I exit the house your worship and took a beer bottle and hit my mother with it.

Court: Did your mother during the argument lift her hand on you or hit you?

Mr Rossouw: No your worship.

Court: So you just went out and took a beer bottle and came back and hit her with the beer bottle.

Mr Rossouw: That's correct.

Court: Did you know that what you were doing was wrong and unlawful and that should she lay a charge you will be arrested and brought to the courts for punishment?

Mr Roussouw: No your worship I didn't know.

Court: You didn't know that if you hit someone with a beer bottle and that person lays a charge you can be arrested and brought to the courts for punishment, you didn't know?

Mr Rossouw: That's correct your worship. At the time of the incident I didn't actually know about it your worship.

Court: Mrs [indistinct] does the State accept the facts and the plea ma'am?

Prosecutor: Yes your worship the state accepts the facts and the plea.

Court: Thank you. Thank you sir the court is satisfied that you have admitted all the elements of this offence. You are found guilty as you have pleaded guilty to the charge."

DISCUSSION

[11] It is trite law that section 112(1)(b) is designed to protect the accused especially an undefended accused, as it was the case in this matter, from adverse consequences of ill-considered plea of guilty - See *S v William* 2008 (1) SACR 65 (C) at 6. Section 112(1)(b) of the CPA has to be applied with care and circumspection, bearing in mind the presumption of innocence entrenched in our Constitution and the fact that where an accused's responses to questioning suggests a possible defence, or leave room for a reasonable explanation other than the accused's guilt, a plea of not guilty should be entered and the matter should be clarified by evidence. It must be stressed that in terms of section 112(1)(b) of the

CPA, the court should be satisfied not only that the accused committed the act but that he committed it unlawfully and with the necessary *mens rea* - See *S v Lebokeng* 1978 (2) SA 674 (O).

[12] In *S v Nyanga* 2004 (1) SACR 198 (C) Moosa J, observed as follows:

> "Section 112(1)(b) questioning has two-fold purpose: firstly, to establish the factual basis for the pleas of guilty and, secondly, to establish the legal basis for such plea. In the first place of the enquiry, the admissions made may not be added to by other means such as a process of inferential reasoning…the second phase of the questioning enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence have been met. They are the questions of unlawfulness, *actus reus and mens rea.* These are conclusions of law. If the court is satisfied that the admissions adequately cover all these elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty."

[13] I must say with respect that the questioning of the accused in this matter by the learned magistrate fell short of the above judicial injunctions. The court could not have been satisfied that the accused admitted all the allegations in the charge-sheet. The accused did not admit that he knew that what he was doing was unlawful. This, he repeated twice in response to questions from the court. The prosecutor also accepted the plea of the accused notwithstanding the fact that the accused twice raised a defence in his answers when questioned by the court. In my view, the

presiding magistrate should have entered a plea of not guilty as it was evident that the legal requirements for the commission of the offence have not been satisfied.

[14] It seems to me that the presiding magistrate was influenced by the submissions of the prosecutor in convicting the accused in these circumstances without satisfying himself whether the accused admits all the element of the offence. As explained above, on 29 November 2019 the matter was on the roll for further investigations to be conducted by the police. The prosecutor informed the court that the investigations were complete. The court verified with the accused whether he still intended to conduct his own case. The accused informed the court that he did not intend to use the services of Legal Aid SA and that he intended to plead guilty to the charge. The prosecutor informed the court that she was ready to finalise the matter. The court informed her to put the charge to the accused.

[15] Prior to the prosecutor putting the charge to the accused, the prosecutor requested permission from the court to approach the accused before the matter could proceed on record. After approaching the accused, the Prosecutor came on record and informed the court that the accused is admitting all the elements of the offence even before the charge was put to the accused. It is not clear why the prosecutor approached the accused however if it was to sway the unrepresented accused to admit all the elements of the offence, such conduct with respect is wrong and has to be discouraged. An accused person has to plead freely and voluntarily and should not be swayed or influenced how he should plead. Unfortunately, in this

matter the court did not establish directly from the accused whether he was pleading guilty freely and voluntarily, without being influenced thereto by anyone.

[16] The accused did not admit all the elements of the offence and the court should have entered a plea of not guilty in terms of section 113 of the CPA. In addition, there are a number of irregularities that were committed by the trial court. The accused was convicted as charged, namely of assault with intent to do grievous bodily harm. What has been established is that the accused hit the complainant with a beer bottle. It is not clear the degree of force that the accused used to hit the complainant with the bottle. Other than what is stated on the charge sheet, it is not clear where on the body was the complainant struck with the said bottle. It is also not clear from the record whether the complainant suffered any injuries pursuant to the alleged assault. The State did not lead evidence on the injuries sustained by the complainant nor did the prosecutor inform the court of the injuries the complainant suffered.

[17] The prosecutor did not submit any medical evidence to prove the injuries sustained by the complaint, if any. Although the actual injuries are not a requirement to be convicted of assault with intent to do grievous bodily harm, it will have a bearing on the sentence imposed by the court (see *S v Mofokeng* 2013 (1) SACR 143 (FB) at par 24). At the time when the matter was heard, the prosecutor informed the court that the investigation was complete notwithstanding the fact that the J88 Medical report was not available. The prosecutor informed the court that she was prepared to finalize the matter without it.

[18] In my view, the answers that the accused gave in response to the questioning by the court did not at all justify a conviction on assault with intent to do grievous bodily harm. It must be stressed that what distinguishes assault with intent to do grievous bodily harm from assault common is that in the case of assault with intent to do grievous bodily harm the offender must have intended to cause the complainant grievous bodily harm - See *S v Zwezwe* 2006 (2) SACR 599 (N) at 603*b* – *d*. The inquiry into the existence of such an intention requires considerations of the following factors:

(i) The nature of the weapon used and in what manner it was used;

(ii) The degree of force used and how such force was used;

(iii) The part of the body aimed at; and

(iv) The nature of injury, if any, which was sustained. *(See S v Dipholo 1983(4) SA 757 (T))*.

[19] The list above is not a *numerus clausus - S v Mapasa* 1972 (1) SA 524 (E). In my considered view, there was no basis upon which the magistrate could find that the accused was guilty of assault with intent to do grievous bodily harm. Even during sentence, the complainant was not called to testify on the injuries she sustained and prosecutor neither informed the court of the alleged injuries sustained by the complainant.

[20] Notwithstanding the irregularities highlighted above, I am of the view that the prosecutor as an officer of the court should have informed the court on the injuries allegedly sustained by the complainant. What is even more concerning was that this was a family feud. The slackness on the part of the prosecution to obtain a Probation

Officer's report could have been cured by the evidence of the complainant. The prosecutor could have called the complainant during sentencing proceedings or at least filed a victim impact report of the complainant. The Supreme Court of Appeal dealt with the role of prosecutors in *Porrit & Another v The NDPP & others* (978/13) [2014] ZASCA 168 (21 October 2014) at paragraph 11 stated that:

> "Prosecutors neither make the final decision on whether to acquit or convict, nor on whether evidence is admissible or not. Their function is to place before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime. Their role excludes any notion of winning or losing. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings." (my underlining)

[21] What is also glaring from the record of this matter is that after convicting the accused as charged, the court failed to inform the accused of his right to give evidence under oath or call witnesses in mitigation of sentence. The Court also failed to hold an inquiry with regard to section 103 of the Firearms Control Act 60 of 2000. Instead, the learned magistrate told the accused that in 2019 the accused was declared unfit to possess a firearm. Despite this error, the court proceeded to declare the accused unfit to possess a firearm licence without giving him the opportunity to make submissions or representations. This in my view, is in conflict with the notion of fairness and justice envisaged in section 35 of our Constitution which requires that an accused person must have a fair trial.

[22] The record further reveals that after sentence, the accused was informed that the matter will be referred to the High Court in order for it to see if the proceedings before the court *a quo* were in accordance with justice. The accused was not

informed that he can make written representations to the clerk of the court within three days of the imposition of sentence to accompany the record to the reviewing judge. The accused in this matter was acting in person and in my view, the court ought to have informed him of this right, especially given the fact that he was probably not aware of it and that the right of review in terms of section 302 of the CPA arises only where the accused has no legal representation.

[23] In *S v Jaipal* 2005 (4) SA 581 at para 39 the court stated that 'a conviction and sentence will only be set aside if the irregularity has led to a failure of justice. If an irregularity leads to an unfair trial, then that will constitute a failure of justice. Each case will depend upon its own facts and peculiar circumstances.' On a conspectus of all the facts placed before me, I am of the view that the presiding magistrate failed to heed the judicial injunctions discussed above and therefore committed a material misdirection which demands interference by this court.

[24] I therefore find that not only did the Magistrate commit an irregularity in this case but also that such an irregularity led to a failure of justice.

ORDER

[25] In the result, I propose the following order:

25.1 The conviction and sentence imposed by the court *a quo* together with the ancillary order in terms of section 103 of the Firearms Control Act 60 of 2000 is reviewed and set aside.

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LEKHULENI AJ
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered

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MANTAME J
JUDGE OF THE HIGH COURT